Petition

81-666

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1981

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, each individually, and on behalf of the other Shareholders of Marshall Field & Co.

Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, HARRY BERCHER, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IRWIN PANTER,
THOMAS I. MATYAS
PANTER, NELSON & BERNFIELD, LTD.,
33 North Dearborn Street, Suite 1930,
Chicago, Illinois 60602,
312/332-5060,
Attorneys for Petitioners.

QUESTIONS PRESENTED

1. Does § 14(e) of the Williams Act render unlawful actions of directors who pursuant to "a policy of independence" resist all tender offers by manipulative acts consisting of lawsuits, expansions, acquisitions of competitors, misrepresentations, and other such prohibited activities?

2. Under § 14(e) of the Williams Act must there be a publication of an offer, or a final unconditional offer, before the acts of the directors are held to be "in connection with a tender offer?"

3. Does the Delaware Business Judgment Rule exempt directors from the provisions of § 14(e)?

4. Where the uncontroverted evidence establishes that recent acquisitions and plans for expansion caused the withdrawal of a tender offer, is there an issue to be decided by the jury as to whether such acts of directors of a corporation were manipulative practices used to defeat a tender offer in violation of § 14(e)?

5. Do directors have the right to aggressively resist tender offers so as to prevent the shareholders from exercising their rights to sell their stock?

The Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the Order, and the Majority and Dissenting Opinions, of the United States Court of Appeals for the Seventh Circuit in favor of the Respondents,[2] Marshall Field & Co., et al., whereby the Judgment of the District Court was affirmed. (A. 318-319). A Petition for Rehearing was denied by the Court of Appeals. (A. 320-321).

---

[1] The Petitioners in this case are the following: Alice D. Sinsheimer, Sam Brown, Harold Kamerling, Julius Green, George A. Levitt, Jack Stacey, Jr., Estelle A. Stacey, Anita H. Johnson, Donald E. Tracy, Barbara J. Tracy, Irving J. Hillman and Stanley Bernstein, each individually and each on behalf of the other shareholders of Marshall Field & Co. Ruth Panter was dismissed from the suit during the pretrial phase of the case. Panter v. Marshall Field & Co. 486 F.Supp. 1186, 1172; R. 25.

[2] The Respondents in this case are the individuals who comprised the Board of Directors of Marshall Field & Co. during the pertinent time and Marshall Field & Co., the corporation.

TABLE OF CONTENTS

Page

Questions Presented...........1

Parties To The Proceeding.....2

Table Of Contents.............2a

Table Of Authorities..........2b-c

Opinions Below................3

Jurisdiction..................3

Statutes......................3a

Statement Of The Case.........4

Argument......................14-30

Appendix......................A.1-321

TABLE OF AUTHORITIES

Page

Applied Digital Data System, Inc. v. Milgo Electronic Corp., 425 F.Supp. 1145 (S.D.N.Y. 1977)................22

Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968)...22

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977)..............19

Clement A. Evans & Co. v. McAlpine, 434 F.2d 100 (5th Cir.), cert. denied 402 U.S. 988 (1970).........................27

Dart Industries, Inc. v. Conrad, 462 F.Supp. 1 (S.D. Ind. 1978)...........................18

Dupuy v. Dupuy, 511 F.2d 641 (5th Cir. 1975)..22

Erie R.R. v. Tomkins, 304 U.S. 64 (1938)............26,27

Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir.), rev'd on other grounds sub. nom. Leroy v. Great Western United Corp., 433 U.S. 173 (1979)...........19

TABLE OF AUTHORITIES

Page

Hirk v. Agri-Research Council, Inc.,
561 F.2d 96 (7th Cir. 1977)...22

H.R. Rep. No. 1711, 90th Cong.,
2d Sess., 4 (1968)..........15

J.I. Case v. Borak,
377 U.S. 426 (1964).........26.

Kohler v. Kohler,
319 F.2d 634 (7th Cir.
1963)........................26,27

Rondeau v. Mosinee Paper Corp.,
422 U.S. 49 (1975)..........14,15

S. Rep. No. 550, 90th Cong., 1st
Sess., 3 (1967).............15

Superintendent of Insurance v. Bankers Life & Casualty Co.,
401 U.S. 6 (1971)...........22

Tcherepnin v. Knight,
389 U.S. 322 (1967).........22

United States v. Peck
102 U.S. 64 (1880)..........25

Opinions Below

Panter v. Marshall Field & Co., 486 F.Supp. 1168 (N.D. Ill. 1980). Aff'd. 646 F.2d 271 (7th Cir. 198. (See Appendix)

Jurisdiction

The Order of the United States Court of Appeals for the Seventh Circuit was entered April 2, 1981. A timely Petition for Rehearing was denied on July 6, 1981.

The subject matter jurisdiction of the District Court was invoked pursuant to the Securities and Exchange Act of 1934, as amended.

STATUTES

Page

Securities and Exchange Act
of 1934, as amended,
§ 14(e), 15 U.S.C. 78n.(e)... Passim
(Williams Act)

"It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statement made, in the light of the circumstances under which they are made, not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

STATEMENT OF THE CASE

Petitioners, Plaintiffs in the original suit filed, were certified as class representatives on June 30, 1978. Petitioners' Complaint was followed by subsequent suits filed against the Respondents, basically repeating the allegations it set forth.

We alleged, inter-alia, violations of § 14(e) of the 1934 Securities and Exchange Act, violations of the property rights of the Petitioners, and breaches of directors fiduciary duty. R. 1,6.

Early in October, 1977, Carter Hawley Hale (CHH), approached Marshall Field & Co. (hereinafter referred to as "Fields") to express an interest in combining the two companies.

PX. 94a; RA. 134;[3] TR. 3020. On December 10, 1977, CHH offered an opportunity whereby each shareholder of Fields would be paid approximately $36.00 for each share of Fields' stock. PX. 111; RA. 148-150. On February 1, 1978, CHH increased the offer whereby each shareholder of Fields would be paid approximately $42.00 for each share of Fields' stock. PX. 288.

CHH sought to achieve this combination continuously from October 1977 through February 21, 1978. Fields filed 14 d) statements with the Securities and Exchange Commission, a lawsuit against CHH, and issued communications to the shareholders and the public, all of which treated CHH's actions as a tender offer throughout this period of time. PX. 428; RA. 142-190; PX. 112; TR. 468, 2928.

---

[3] Appendix in the Record of the Court of Appeals for the Seventh Circuit, hereinafter referred to as "RA."

Fields' stock was trading at the $20 level prior to CHH's December 10, 1977, public announcement and climbed to the high $20's to low $30's while CHH's interest in combining with Fields was pending. PX. 150, RA. 101. After the withdrawal of the tender offer on February 21, 1978, Fields' stock quickly returned to the $19 level. PX. 150; RA. 101.

Underlying the Respondents' actions was the policy first decided in 1967, and faithfully followed thereafter, namely, to remain a totally "independent" company and resist all takeover attempts. 486 F.Supp. at 1177 (A. 29); TR. 1036-37, 2852. This policy was openly and strongly expressed in oral statements and in publications by the Fields' Board of Directors on many occasions during the period CHH sought to combine with Fields. PX. 428; RA. 154, 158, 162, 166, 177.

The district court found that the approach by CHH to combine with Fields in 1967 failed to materialize because "[n]othing came of this expression because the directors of Fields decided that the company's future lay in remaining an independent corporation". 486 F.Supp. at 1175 (A. 16).

The district court also stated:

> "For a long period of time prior to December 10, 1977, Marshall

> Field was such a company. In each instance when approaches were made to its directors by anyone interested in acquiring it, or by another corporation that desired a merger, the directors considered the matter but concluded in each case that they did not want the company's uniqueness among its customers diluted by affiliation or merger with another retailer." id.

The Respondents' aggressive actions to block CHH's tender offer included the following:

1. Consulting Joseph H. Flom, a leading figure in the area of takeovers so as to defeat the tender offer. PX. 9; 486 F.Supp. at 1176; (A. 19); TR. 1004-006, 1121, 1217-18, 1227, 2027-28, 2101-13. His primary advice to the Resondents was to engage in immmediate expansion and to rely upon anti-trust problems to deter and defeat tender offers. PX. 15, 42, 62-63; 486 F.Supp. at 1176; (A. 20); RA. 107; TR. 1228-29; 2030-31. Respondents constantly sought and earnestly followed his advice. 486 F.Supp. at 1176 (A. 25).

2. Delaying negotiations with CHH. PX. 95, 96; RA. 137, 139; TR. 1343-44. This gave the Respondents two months

between October 11 and December 11 during which they established their defenses. This time was used to follow attorney Flom's advice by accelerating acquisitions of competitors of CHH, by preparing the lawsuit they later filed against CHH, and raising the spectre of antitrust in every aspect of their handling of CHH's approach. PX. 102, 238, 337, 428; RA. 130, 152, 153, 158, 162, 166, 170-71, 177, 181-82; TR. 869-70, 3182, 3190-92, 3334-35.

3. Filing and prosecuting an antitrust lawsuit against CHH to enjoin CHH from preceeding with the tender offer within hours after receiving notice of it. PX. 112; TR. 468, 2928.

4. Aggravating any possible antitrust problems by a hurried, ill-advised and expensive series of acquisitions of other retailers who were competitors of CHH and expansions into new markets in close proximity to existing CHH retail operations. PX. 109, 130, 137, 148, 151, 238, 337; RA. 130, 197, 200; TR. 553, 869-70, 2939-40, 3182, 3190-92.

5. Soliciting all pertinent governmental agencies, including the Securities and Exchange Commission, Federal Trade Commission, the Illinois Securities Commission, and others to intervene to prevent the tender

offer. RA. 194; TR. 1184. The Respondents went so far as to have their attorneys prepare and give to the Attorney General of Illinois a Complaint to be filed in the name of the State. PX. 196.

6. Proclaiming continually in press releases as well as letters to stockholders and employees their absolute intention to keep Fields independent. PX. 428; RA. 152, 154, 158, 162, 166, 170-71, 181-82. They reiterated that acquisitions of Fields by CHH would not be in the "best interests of Marshall Field & Company and its stockholders, employees, customers and the communities it serves." PX. 428; RA. 153, 166.

The Respondent's acts prevented the shareholders from selling their Fields stock to CHH. TR. 1404, 1406-07, PX. 345.

On February 22, 1978, CHH announced that it no longer was interested in a combination with Fields and withdrew its $42.00 offer. TR. 1404, 1406-07; PX. 345.

INTRODUCTION

The massive erosion of shareholders' rights resulting from this decision is portrayed by the Honorable Richard D. Cudahy in his dissent:

> "Unfortunately, the majority here has moved one giant step closer to shredding whatever constraints still remain upon the ability of corporate directors to place self-interest before shareholder interest in resisting a hostile tender offer for control of the corporation." Panter v. Marshall Field & Co., et al. 646 F.2d 299 (7th 1981) (Dissenting) opinion) (A. 234).

The actions that concern us here are those of a group of ten (10) private individuals exceeding their power, violating the securities laws, and abusing their trust. These directors have misconstrued their obligations and as a result, 17,000 shareholders were prevented from exercising their right to sell their shares at an offering price of $42.00 a share instead of a market price of $19.00, for a total loss exceeding $200,000,000.00.

The issues in this case range over a considerable area of important and sometimes uncharted law. Clarification of the duties and limitations of the powers of directors, under the Williams Act, and of the freedom of shareholders to sell their shares, must flow from the decision of this Court. The growing usurpation of powers over property they do not own, has carried the directors to where they deal with and think of the corporation as their own. This Board in defending its interests against a "takeover" has taken over the right of the shareholders to sell their stock.

In the past an owner of stock secured: a voice in the operation of his corporation; a right to replace the members of the board, and thus, the management; a clearly defined duty of management to operate the business for profit; a board acting as trustee for the shareholders with no separate interests of its own; and a complete and absolute right to sell his stock.

Today, each of these rights has been abrogated or threatened. Tomorrow, the shareholder may continue to own his certificate but the benefits and control will go to others. However, in this action we are concerned only with the last remaining right, the right of sale.

The directors appropriate interests to themselves apart from those of the owners. They portray themselves as "defending" the "corporation" from "aggressors" who would "capture" it by "takeover". The "corporation" is defined as an entity apart from its shareholders. One must conclude that the "corporation" is the board of directors. So that the defense against the "takeover" is a defense of their personal position, prestige, and domain.

ARGUMENT

1. The Thrust Of The Williams Act Is That The Shareholders, And Not The Directors, Should Decide Whether A Tender Offer Is To Be Accepted Or To Be Rejected.

The Supreme Court of the United States stated in Rondeau v. Mosinee

Paper Corp., 422 U.S. 49 (1975):

> "By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed the Act's draftsmen commented upon the "extreme care" which was taken to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid...
>
> As observed, the principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer." Id. at 58-60; citing to S. Rep. N. 550; 90th Cong., 1st Sess., 3 (1967); H.R.Rep. No. 1711, 90th Cong., 2d Sess., 4 (1968). (emphasis added)

The Securities and Exchange Commission filed an Amicus Curiae brief in connection with this appeal:

> "This case presents fundamental questions concerning the application of antifraud provisions of the federal securities law to takeover contests...
>
> The legal principles enunciated in the district court's decision, however, may erode significantly the federal protection provided by § 10(b) and § 14(e)...
> The court's interpretation of § 14(e) was also unduly narrow. Numerous conditions are placed on almost all tender offers, and fraud in connection with conditional tender offers may be as harmful to public investors as fraud in connection with unconditional tender offers.
> Nevertheless, the district court held that the mere existence of conditions in a tender offer may remove the offer from the coverage of § 14(e). The case also raises the question whether the protections of § 14(e) are available during the entire tender offer process -- at least from the time of the public announcement of a tender offer proposal -- to protect investors against deception im-

> pairing their investment decisions, whether or not shareholders actually are given the opportunity to tender to the bidder. Finally, the district court might be viewed as holding, as a matter of law, that public statements by incumbent management in response to a tender offer proposal comply with the antifraud provisions of the securities laws, even though those statements omit facts which would enable shareholders to evaluate the likelihood that the particular proposal -- or any future proposal -- will be successful. The district court's resolution of these issues, if followed, may seriously undermine not only private enforcement of the securities laws but Commission enforcement as well. Brief of the Securities and Exchange Commission, Amicus Curiae, Court of Appeals - Seventh Circuit, pp. 1 - 3.

Tender offers are important and significant mechanisms in the growth and management of corporations. They serve as a tool to remedy "inefficient or sluggish management", as well as "providing investors with an opportunity to sell their shares at advantageous premiums over prevailing market prices". Dart Industries v. Conrad, 462 F.Supp. 1, 8, (S.D. Ind. 1978).

Target management may state its opposition to a tender offer but will not be permitted to interfere with the shareholders right to accept or reject the offer. As the court in Dart, supra, stated:

> "The language of the Williams Act and its legislative history demonstrate the intent of Congress that, when an interstate offer is made for the shares of a public corporation, its success or failure should be left to the free and informed investment judgment of the shareholders of that corporation." Id. at pp. 1, 12.

The Williams Act regulates the conduct of parties in connection with a tender offer and its purpose is to protect investors. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 35 (1977). This purpose is effectuated by allowing both the offeror and target management to present fully their arguments to the shareholder, then letting the shareholder make his own decision as to whether to sell. Great Western United Corp. v. Kidwell, 577 F.2d 1256, (5th Cir.) rev'd on other grounds sub. nom. Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

The Honorable Richard D. Cudahy concisely summarized the error committed by the district court.

> "One may of course argue that what the directors did here was merely to make the normal reflexive response of incumbent management to efforts by outsiders to take over control of a corporation. In fact, applicable federal and state takeover legislation suggests that incumbent management -- protective of its own powers and prerequisites -- may almost automatically attempt to defeat hostile tender offers, whatever their merits. These assumptions may reflect a realistic view of human and corporate nature, and perhaps the law should simply excuse directors for thinking of themselves first and stockholders second in the event of a threatened takeover. In that regard I do not perceive the actions of Field's directors here as necessarily more egregious than many others in like circumstances. But under the legal norms which now must guide us (and no matter who

> has the burden of proof), there is no good reason to take this unfortunately too typical but nonetheless important and substantial, case from the jury." 646 F.2d at 310 (Dissenting opinion) (A. 279).

2. The Activities Of The Respondents Were "In Connection With Any § 14 (e).

The district court directed a verdict for the Respondents on Petitioners' § 14(e) claim on the ground that Respondents' activities were not "in connection with any tender offer" because the tender offer contained certain conditions, and there was no public announcement of the tender offer. 486 F.Supp. at 1188. (A. 85).

The district court acted in contravention of § 14(e), a remedial act, by strictly construing phrases in the Act. Tcherepnin v. Knight, 389 U.S. 332 (1967); Hirk v. Agri-Research Council, Inc, 561 F.2d 96 (7th Cir. 1977); Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968). The Act must, therefore, be broadly, liberally, and flexibly construed, not technically and restrictively, so as to effectuate the Congressional purpose. Applied Digital Data Systems, Inc. v. Milgo Electronic Corp., 425 F.Supp. 1145 (S.D.N.Y. 1977); Tcherepnin v. Knight, supra; Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971); Hirk v. Agri-Research Council, Inc., supra; Blau v. Rayette-Faberge, Inc., supra; Dupuy v. Dupuy, 511 F.2d 641 (5th Cir. 1975).

The district court erred in requiring a public announcement of a tender offer to trigger the involvement of § 14(e). The subject statute, § 14 (e), makes no such requirement whatsoever. However, even if a public announcement was a requirement for the triggering of § 14(e), such requirement was satisfied as of December 10, 1977, when CHH caused its proposal to be sent to the Respondents. PX. 428; RA. 148-50.

The majority opinion dealt with these questions and found:

> "Here there is uncontroverted evidence that it was Field's recent acquisitions and plans for expansion that caused the withdrawal of the CHH tender offer." 646 F.2d at 285. (A. 167).

In spite of finding the existence of a tender offer and its defeat by the

Respondents, the majority rejected Petitioners' claims under § 14(e) on the ground that there was no reliance or deception because the tender offer was withdrawn before the shareholders had the chance to accept or reject it. Nowhere in their decision do they discuss "manipulation", also dealt with by § 14(e).

Having already found that there was a tender offer and that it was the actions (manipulations) of the Respondents that defeated it, we are lead to the anomalous result that a defendant could engage in manipulative, fraudulent, and deceptive practices so long as it made sure these practices were successful in defeating the tender offer. The successful manipulator and deceiver is rewarded, whereas the unsuccessful one is punished under § 14(e).

It would be the height of cynicism to presume that the law could countenance such a result.

In United States v. Peck, 102 U.S. 64 (1880), the United States Supreme Court quoted with approval the following statement:

> "Judge Thompson said 'It is a sound principle that he who prevents a thing of being done shall not avail himself of the non-performance he has occasioned.'" pp. 65-66.

3. Delaware Business Judgment Rule Provided No Haven From A Violation Of The Federal Securities Laws.

The district court stated in its memorandum opinion that:

> "Directors of corporations discharge their fiduciary duties when in good faith they exercise business judgment in making decisions regarding the corporation." 486 F.Supp at 1194. (A. 117).

The district court indiscriminately applied the Delaware Business Judgment Rule to Petitioners' federal as well as common law claims. This was error, for the Delaware Business Judgment Rule is not applicable to an action brought under § 14(e).

The standard for measuring a defendant's conduct under the Securities Exchange Act of 1934 is federal and not state. J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964); Kohler v. Kohler, 319 F.2d 634 (7th Cir. 1963). The Erie doctrine does not require the application of Delaware substantive law to a claim arising under the Securities Exchange Act of 1934. Erie

R. R. V. Tompkins, 304 U.S. 64 (1938); Clement A. Evans & Co. v. McAlpine, 434 F.2d 100 (5th Cir.) cert. denied 402 U.S. 988 (1970). To hold otherwise would destroy the uniformity of federal securites law. Congress certainly did not intend for the Securities Exchange Act of 1934 to be hindered by restrictive applications of state law (Kohler, supra, at 634) or to establish Delaware as a sanctuary from the operation of federal securities law.

Judge Cudahy stated in response to the majorities' opinion that the Delaware Rule was applicable:

"Relying on several recent

> decisions interpreting the Delaware business judgment rule, the majority fails to make the important distinction
>
> 'between the activity of a corporation in managing a business enterprise and its function as a vehicle for collecting and using capital and distributing profits and losses. The former involves corporate functioning in competitive business affairs in which judicial interference may be undesirable. The latter involves only the corporation-shareholder relationship, in which the courts may more justifiably intervene to insist on equitable behavior...'" 646 F.2d at 299 (Dissenting opinion) (A. 237).

Judge Cudahy closed his dissent with the following:

> "To have taken this close case presenting a wide range of defensible inferences from the jury is a major disservice to stockholders everywhere. This case announces to stockholders (if they did not know it before) that they are on their own and may expect

> little consideration and less enlightenment from their board of directors when a tender offeror appears to challenge the directors for control. I believe that only the submission to jury verdict of cases like this one can restore confidence in our system of corporate governance. 646 F.2d at 312. (A. 294).

CONCLUSION

This "giant step" in abrogation of the basic property right of a shareholder to freely sell his shares for the best price available demands review by the Highest Court. Clarification of the duties and limitations of the power of directors under the Williams Act is essential. The conflicts of opinion in the courts and with the governmental agency charged with the enforcement of the securities laws, call for resolution.

We pray that Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit in this case.

Respectfully Submitted,

Irwin Panter

Irwin Panter
Attorney for Petitioners

Irwin Panter
Thomas I. Matyas
PANTER, NELSON & BERNFIELD, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
312-332-5060

Appendix

81-666

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1981

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, each individually, and on behalf of the other Shareholders of Marshall Field & Co.

Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, HARRY BERCHER, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR.,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

IRWIN PANTER,
THOMAS I. MATYAS
PANTER, NELSON & BERNFIELD, LTD.,
33 North Dearborn Street, Suite 1930,
Chicago, Illinois 60602,
312/332-5060,
Attorneys for Petitioners.

RUTH PANTER et al., RICHARD WEISS, ALAN MARKOVITZ, PAUL KRIENDLER, DAVID H. GREENSTEIN, RONALD EGNOR, WILLIAM SALTIEL, et al., MICHAEL DeBARTOLO, JOSEPH BERKE, Plaintiffs,

v.

MARSHALL FIELD & COMPANY et al., Defendants.

Nos. 78 C 537, 78 C 620, 78 C 1179, 78 C 1141, 78 C 1700, 78 C 2556, 78 C 2067, 78 C 2373 and 78 C 2480.

UNITED STATES DISTRICT COURT,
N.D. Illinois, E.D.

March 3, 1980

MEMORANDUM

LEIGHTON, District Judge.

This is a consolidated jury trial of four out of nine related class suits in which the complaints allege violations of Sections 10bm 14d, and 14e of the 1934 Securities and Exchange Act. Twenty-one plaintiffs, on their behalf and representing four subclasses of

16,662 shareholders who own 9,054,065 shares of common stock of Marshall Field & Company, a Chicago based department store, sue for preliminary and permanent injunction, damages, and other relief. The suits are brought under federal securities laws and rules and regulations of the Securities and Exchange Commission. Plaintiffs invoke the jurisdiction of this court pursuant to 15 U.S.C. § 78aa; and they allege pendent claims based on doctrines of the common law.

In the earliest suit filed in this court, 78C 537, plaintiffs and class representatives are Alice D. Sinsheimer, Sam Brown, Arnold Kamerling, Julius Green, George A. Levitt, Jack Stacey, Jr., Estelle A. Stacey, Anita H. Johnson, Donald E. Tracy, Barber J. Tracy, Irving J. Hillman and Stanley Bernstein; in the next, 78 C 620, Richard Weiss; in the next, 78 C 1141, Paul Kriendler of New Jersey;[2] in the next, 79 C 1179, Allen J. Markovitz of Pennsylvania; in the next, 78 C 1700, David H. Greenstein; in the next, 78 C 2067, William Saltiel and Clarice Saltiel; in the next, 78 C 2373, Michael DeBartolo of New York; in the next 78 C 2480, Joseph Berke; and in the last filed of these cases, 78 C 2556, Ronald Egnor of New York. Plaintiffs, in varying amounts, are owners of the common stock of Marshall Field & Company, a Delaware corporation with its principal offices in Chicago, Illinois.

The defendants are Marshall Field & Company,[3] Angelo R. Arena, George C. Rinder, and Arthur E. Osborne, president and chief executive officer, executive vice president, and senior vice president, respectively, of Marshall Field; Jean Allard, Edward McCormick Blair, John M. Budd, Albert B. Dick, III, Howard M. Packard, John M. Simpson and Harold Byron Smith, Jr., directors of the Company.[4] Each defendant, also in varying amounts is a Marshall Field shareholder.

In a stipulation of the parties approved by this court in a pretrial order, it has been agreed that trial on the pleadings in Weiss, 78 C 620, Egnor, 78 C 2556, and Berke, 78 C 2480, will be binding on all parties in these consolidated cases with the exception of the plaintiffs in Panter, 78 C 537.

In each of these consolidated class suits, after the jurisdictional, venue, and general class allegations, plaintiffs complain[5] that in early October, 1977, a California corporation named Carter Hawley Hale, through certain members of its board of directors, approached Marshall Field & Company and expressed an interest in the two companies beginning to negotiate a merger; that this interest continued from that time through and including February 21, 1978; that on December 12, 1977, Carter Hawley Hale delivered a letter to Field proposing that it consider a transaction whereby Carter Hawley Hale would exchange a quantity of its common stock for outstanding stock of Field; that included in the proposal was the understanding that Field shareholders would have the option of receiving cash up to 49% of the total transaction; that on the same day, Carter Hawley Hale issued a press release announcing this communication that was transmitted by it to Field; that from time to time prior to that date, substantial, listed companies, other than Carter Hawley Hale, also approached Field proposing a merger or other form of permanent relationship between Field and those companies; that in February, 1978, Carter Hawley Hale announced that a specific tender offer would be made for Field's common stock under the terms of which Carter Hawley Hale would acquire outstanding common stock of Field for cash and stock amounting to approximately $42.00 per share; that Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. §78n(e), provides in its pertinent part that:

It shall be unlawful for any person

to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

It is further alleged that, in spite of the prohibitions contained in Section 14(e), defendants, the directors of Marshall Field, conspired to and did embark on a course of conduct designed to deceive plaintiff(s) and other class members in order to induce plaintiff(s) and other class members to oppose the tender offer. It is also alleged that defendants conspired and embarked upon a course of manipulative acts and practices designed substantially to inhibit plaintiff(s) and other class members from accepting the tender offer. Plaintiffs allege a course of conduct, followed by defendants, aimed at defeating the tender offer of Carter Hawley Hale, and misleading and deceiving Field's shareholders and the public with regard to the company's plans for corporate expansion. In other counts of the complaints, it is alleged that the same course of conduct unlawfully violates Section 10(b) of the Securities and Exchange Act of 1934, and Rule 10(b)-5 promulgated thereunder by the Securities and Exchange Commission; and further, that the acts of the defendants about which plaintiffs complain, and which they allege are unlawful, were breaches of fiduciary obligations which defendants, as Marshall Field directors, owed to the stockholders of the company, including plaintiffs and other members of the class. Plaintiffs pray for injunctive relief, damages which one plaintiff claims exceed $200 million, the award of attorneys' fees and costs, and such other relief as the court may deem just and proper.

Defendants have answered each complaint, and they deny all allegations which charge that they, in any way, have violated any of the provisions of the Securities and Exchange Act of 1934, Section 10b or 14(e), or any fiduciary duty owed to the stockholders of Marshall Field & Company. They admit, however, that on or about December 12, 1977, Carter Hawley Hale delivered a letter to Field, but state that the letter speaks for itself; that in connection with the letter, defendants caused to be published a communication in the Chicago Tribune that incorporated a letter to Field employees; that they mailed a letter to Field's shareholders; that they filed a lawsuit in the United States District Court for the Northern District of Illinois against Carter Hawley Hale; that thereafter they agreed to acquire five former Liberty House Stores in Washington and Oregon, and announced plans to open and operate a store in Houston, Texas; and that Field is considering the establishment of other stores in other areas of the country including Northbrook, Illinois, and the southwest United States. They further admit that Field has discussed with others the possible acquisition of other stores.

In addition, defendants have pled affirmative defenses, including their allegation that plaintiffs' complaints fail to state a claim on which relief can be granted by this court; that the complaints fail to satisfy the requirements of Rule 23, Federal Rules of Civil Procedure, precluding plaintiffs from proceeding in these class suits; that the complaints fail to satisfy the requirements of Rule 23.1 of the Federal Rules of Civil Procedure, and thus plaintiffs cannot proceed with a derivative suit; and that the complaints are barred in whole or in part by the applicable statutes of limitations. Defendants request the court to dismiss plaintiffs' complaints, award them costs and fees and grant them such other and further relief as may be appropriate.

After four weeks in which the jury has heard evidence consisting of testimony of thirteen witnesses, excerpts from four depositions, a vast number of exhibits, and several stipulations, plaintiffs have rested their case in chief; defendants now move for dismissal pursuant to Rule 41(b), or in the alternative, for directed verdicts pursuant to Rule 50(a), Federal Rules of Civil Procedure. These motions require the court to view the evidence in the light most favorable to the plaintiffs;[6] and all reasonable inferences which can be drawn from the evidence must be in their favor.[7] Accordingly, the court determines that the following are the facts most favorable to the plaintiff which the jury in this case could find from the testimony, the deposition excerpts, the stipulations, and the exhibits in the record.

I.

Marshall Field & Company is a full line, high quality department store which has sold general merchandise, apparel and furniture in Chicago and other large cities of the country. It was founded in 1852 by the Chicago merchant, Marshall Field, and the company expanded gradually over the next century. By the end of 1976, it was the eighth largest department store chain in the United States, with 31 stores, 15 of them in the Chicago area and others in Cleveland, Ohio, and in Seattle and Spokane, Washington. The company is today a publicly owned corporation, with more than 16,000 shareholders having purchased in excess of 9,000,000 shares of its common stock sold on the New York and Midwest Stock Exchanges. Its board of directors at the end of 1976 consisted of twelve persons with extensive industrial, financial, business and professional backgrounds; five of them were executives of the company. It had five corporate and subsidiary divisions and employed thousands of persons in various capacities, but no member of the Field family either occupied a management position or was a director of the company. For the year 1976, Marshall

Field reported to its shareholders that it had made sales totaling $609.9 million.

Despite this growth, Field's expansion did not match that of other department store chains. It was an attractive combination of stores and was highly regarded for the quality of its name, one which industry leaders thought could be taken anywhere in the country. But because of its accumulated worth, the strength of its balance sheet, its large cash reserves, and its borrowing potential, leaders of the department store business considered Field vulnerable to a takeover by another company. In fact, investing shareholders studied Field's earning reports, researched its performance "and determined that (Field in mid-1976) was a good company for a takeover."[9] This evaluation had become known to Field, its management and directors as early as the late 1960s.

In 1967, one of the companies that expressed an interest in a merger with Field was Carter Hawley Hale,[10] a nationwide, multi-division chain of department stores with corporate offices in Los Angeles, California. Nothing came of this expression because the directors of Field decided that the company's future lay in remaining an independent corporation. Carter's interest, however, was significant. It had operated traditional department stores since 1946. It was a large company with locations in several cities and operations covering northern California and the southwestern United States. Carter constantly analyzed potential markets throughout this country and Canada; it acquired several stores each year from the origin of its business. By 1977 it had increased its operations to 71 traditional stores, 30 specialty stores, and 433 book stores. It continued to expand by acquisitions throughout the time the controversy in these suits arose.

Being an attractive company, one vulnerable to a takeover, presents many problems to the management, the directors, and the shareholders of a publicly owned American corporation. A takeover can be either friendly or unfriendly. It is friendly when solicited or welcomed by the target company. It is unfriendly when the target company is the object of acquisition by a raider who, complying with state and federal securities laws, makes the required disclosures and proposes an exchange or tender offer for the number of outstanding common shares of the company that will result in control of the target. A takeover, when unfriendly, has a disruptive effect on the management of a target company and its board of directors. It may be welcomed by some, but not all of the target company's shareholders. A takeover can be expensive; it often raises questions of possible violations of the antitrust laws; and it presents problems under the securities statutes and the rules and regulations adopted thereunder. Consequently, a company vulnerable to a takeover must have guidance from lawyers, investment bankers, accountants, and business consultants.

For a long period of time prior to December 10, 1977, Marshall Field was such a company. In each instance when approaches were made to its directors by anyone interested in acquiring it, or by another corporation that desired a merger, the directors considered the matter but concluded in each case that they did not want the company's uniqueness among its customers diluted by affiliation or merger with another retailer. Pressed, however, by the problem of the company's continued vulnerability to a takeover, Field's directors sought the advice of legal counsel. They consulted the New York law firm of Skadden, Arps, Slate, Meagher & Flom On December 9, 1969, they employed the services of Joseph H. Flom of that firm, a lawyer whose expertise was in proxy contests, mergers and acquisitions, tender offers and going-private transactions. Flom, after becoming acquainted with Field's position in the department store industry, including its financial standing and potential, gave the directors his advice on what they should do when the company was confronted with any inquiry or expression of interest in being acquired or being the subject of a merger. He also advised the company's executives on how to react to the prospect of a takeover.

He told the directors, and through them the executives, that in each instance when an acquirer expressed interest or the proposer of a merger made an approach to Field, representatives of management should listen, bearing in mind that the interests of the company's sharesholders were paramount. They were to respond by indicating that Field was not on the block, and if the particular executive believed the suggestion of acquisition or the proposal of merger was being made seriously, he should express the views of the directors that, in their business judgment, the interests of Field shareholders would be best served by the company remaining independent. Flom advised that directors and those who manage a company should always keep in mind that the timing of the sale of a business, if a sale is to take place, is very important; that if a company, through its management executives, saw and believed that its future was bright, or that the general economic conditions would be more propitious in the future, the directors had the right to decide when the business would be sold, as well as whether this should be done. He told the directors that just because someone approaches a company, no one in that company had any obligation to say automatically that the company was on the block. He further advised the directors that management should always endeavor to determine whether a person proposing an acquisition of the company, or a merger with it, had thought through the proposal being made; whether they were serious; and also whether they had considered the antitrust implications of an acquistion or merger. Flom was retained and, after December 1969, either he or a member of his firm attended each meeting of Field's board of directors.

Later, when his advice was sought by Field's executives concerning how they should deal with an inquiring potential acquirer, or one who was suggesting a merger, Flom, or one of his partners, repeated in general the advice he had given the directors when he was retained in 1969. On one occasion, he advised Field's chief executive officer that whenever a discussion was had with anyone seriously discussing acquisition of Field, potential merger, or the possibility of making a tender offer, at least two persons should attend such a meeting. Details of such transactions should be discussed informally and, preferably, an investment banker or financial officer should not be present. He advised that management personnel representing Field should always listen to what the visitor had to say. If a proposal was outlined, the executive was not to turn it down or argue about it, was never to say that it sounded good; but was simply to say that it was interesting. The executive was advised to say to the proposer that his proposal would be considered and that management would get back to him. Flom urged Field's chief executive officer that he should always find out who the visitor represented and whether he had authority to make a proposal. If he is speaking for someone else, the Field representative should learn all that he can, factual and financial, about the interested party. Field's representative should always inquire about the existence of antitrust issues and whether these had been considered. Flom admonished that anyone speaking for Field should remember at all times that his job was to do the best that could be done for the company's shareholders.

Flom's advice was accepted and followed. Every Field executive who had either a telephone conversation or meeting with any inquirer concerning possible acquisition of or merger with Field, or a proposed tender offer or exchange offer, wrote a memorandum that became part of the business records of the company. Many of these memoranda are evidence in this joint trial, having been produced by defendants during pretrial discovery in these cases.

In the ten-year period between the time CHH first expressed an interest in Field and 1977, at least three other department store companies, in one way or another, did the same. For example, in 1970, Associated Dry Goods Company expressed a desire to merge with Field. This expression of interest, and the contacts of Field executives with representatives of Associated, were described in memoranda and made part of the company's files. At meetings of the board, the subject was discussed; and after considering the matter, the directors voted, reaffirming their earlier decision that Marshall Field should remain independent. At about the same time that the approach by Associated was considered, Field acquired Halle Brothers, a retailer with stores in Cleveland and other Ohio communities, and in Erie and West Erie, Pennsylvania. Associated had stores in the same cities.

In 1975, Federated Department Stores

made acquisition overtures to Field. Again, all of the contacts with representatives of this potential acquirer were made the subject of memoranda that became part of the company's business records. The subject was submitted, with recommendations and views of management, to Field's board of directors. After consideration, the board concluded that remaining independent provided Field with a future that had greater possibilities than being acquired by another company. The Board notified Federated that it did not wish to explore the matter further.

In August of the following year, Dayton-Hudson Corporation of Ohio inquired of Field's management about a possible acquisition of the Company. Again, Field's executives met with spokesmen for Dayton-Hudson, recorded in memoranda what they said, and reported the inquiry to the Board. The directors, after considering the contact, decided that it was in the best interest of the shareholders and the company that Field remain an independent department store. At the same time the Dayton contact was being considered, Field's management, executing policy decisions of the board, sought to show to the public that the company had the ability to grow. Accordingly, management personnel embarked on a program to acquire certain Liberty House Stores in Portland, Oregon and Tacoma, Washington, a market area where there was an overlap between Dayton-Hudson stores and those operated by Liberty House. When Dayton-Hudson

later withdrew its acquisition overtures in May, 1977, Field's interest in the Liberty House stores subsided. Subsequently, all inquiries made of Field by companies wanting to acquire it or negotiate a merger were met by the directors with the same conclusion: it was best for the company that it remain independent. This conclusion was expressed so many times that at least two directors who are defendants in these cases recall it being stated as a policy. The occasions when the directors reflected this policy were all recorded either in memoranda which became part of the company's records, or in minutes of board meetings. Prior to December 14, 1977, however, no communication of the board to Field's shareholders, no press release, nor any report Field made to any state or federal regulatory agency contained any statement or description of this policy.

In 1977, the president and chief executive officer of Field was Joseph A. Burnham, an executive who nationally enjoyed a good reputation among leaders of the department store industry. The company's directors, however, thought that Field needed someone to "turn the company around"; they came to believe Burnham needed help at the highest level of management. Therefore, it was decided that Field should seek an experienced department store executive who could work with Burnham and be groomed to succeed to the office of president and chief executive of the company. After a search that took Field's executives throughout the country, with Burnham principally responsible for the search, the man who was selected and offered the position was Angelo R. Arena who, at the time, was chairman of Nieman-Marcus, the $500 million a year division of Carter Hawley Hale based in Dallas, Texas. The agreement with Arena that he join Field later in 1977 was finalized in August of that year. It was expressly understood by Arena, Field's management, members of the board executive committee and Burnham in particular, that he was to join the company, work with Burnham and, if everything went well, in two or three years he was to succeed Burnham as president and chief executive officer of Field.

Having reached this understanding with Field's people, Arena then had a conversation in Los Angeles, California with Edward W. Carter and Philip M. Hawley who were, respectively, board chairman, president and chief executive officer of CHH. He told them that the opportunity he was being offered at Field was too attractive for him to refuse, and that even being chairman of an important CHH division did not have the career prospects equal to that being offered him by Field. Carter and Hawley told Arena that they did not believe Field was going to remain independent; that he, Arena, was chancing it in taking a job in the face of the possibility there will be a takeover of the company. Arena told his colleagues he had a conversation with Burnham in which he was assured that Field was going to remain an independent department store chain and, therefore, he thought that his decision to accept the position being offered him was one that he should make. Carter and Hawley agreed. Arena proceeded with plans to join Field late in 1977.

However, on October 10, 1977, while he was returning from a vacation, Burnham suffered a fatal heart attack. His death caused the executive committee of Field's board of directors to hold an emergency meeting on October 11, and the result was a recommendation that Arena be asked to come to Chicago immediately and replace Burnham as a Field director, its president and chief executive officer. A special meeting of the board was called for October 13. Edward McCormick Blair, a Field director, attended the executive committee meeting. However, sometime during the day, while Blair was occupied with the emergency caused by Burnham's death, Edward W. Carter called Blair's 93 year old father and, after expressing condolences concerning Burnham's unexpected passing, told the elder Blair that in his view a merger between Field and CHH was an ideal business arrangement. Carter knew enough about the relationship between Blair, the Field director, and his father to know that his mention of the advantages of a Field-CHH merger would be discussed by them; it was. In addition, during the evening of October 12, the younger Blair received a telephone call from Gaylord Freeman, a banker long connected with Field's largest shareholder, the First National Bank of Chicago, who said he was calling for his friend Ed

Carter to urge that the subject of a Field-CHH merger be discussed at the next meeting of Field's directors.

The next day, at the special meeting of the directors, after Arena had been elected and appointed to Burnham's old job, George C. Rinder, Executive Vice President of the company, reported on the contacts by Carter. A summary of the board minutes shows the entry that "(p)resumably the inquiry was prompted by the untimely death of Mr. Burnham. The consensus of the Board was that the Company's future plans are such that the proposed business combination should not be considered because the best interests of the Company's stockholders would be served by this Company's continuing as an independent entity in view of the many opportunities to increase earnings and return to the stockholders (sic)." Arena arrived in Chicago on Monday, October 17, and took over as head of the company's management.

CHH's approaches to Field about a possible merger did not cease; in fact, they gathered momentum. On the day Arena began his duties as the company's chief executive officer, Philip Hawley called him from Los Angeles and urged him to consider the advantages of a Field-CHH merger. Arena reminded Hawley that he was just beginning some rather arduous duties; that Field, like all similar companies, was approaching the most important part of the department store sales year, the Christmas season; and that he wanted to get to understand Marshall Field and its business, and become acquainted with the people with whom he was to work. He told Hawley of feeling uncomfortable bringing to the board of directors the question of selling the company when he had been employed to lead it toward achieving what the directors had in mind for the future.

On the next day, from Philadelphia, Carter called Blair and asked him to consider his "ten fundamental reasons" why he thought a Field-CHH merger made sense. Blair listened, made notes and thanked Carter for his expression of interest. He assured Carter that Field thought highly of CHH; and that if Field should consider a merger with any company, CHH would get the first chance. Carter in turn told Blair that in the event of a merger, Blair would be an important director on the new combined board. Hawley, in the meantime, called Arena and insisted on a meeting of Field's representatives with those of CHH to discuss a merger; and that the meeting take place before the end of the Christmas shopping season.

Arena was disturbed by this insistence on the part of Hawley. The subject of merger, acquisitions, and takeovers of another company were not strange to him. He knew the economic and business consequences of a takeover for, after all, he had just left Carter Hawley Hale, a department store chain which had grown through the acquisition of other companies. He had, in his short time with the Field management, learned of Joseph H. Flom's retainer by the company, and he was familiar with the advice Flom had given management and the directors.

Arena knew that Flom's advice to his clients when faced with the prospects of an unfriendly takeover was to raise questions concerning possible violations of the antitrust laws. Arena knew that once a board of directors, in good faith, considers any merger proposal, one of the questions to be addressed is whether such a business combination was legal. Therefore, on November 16, 1977 he asked Hammond Chaffetz of the Chicago law firm of Kirkland & Ellis to analyze the antitrust implications of a merger between Field and CHH.

Kirkland & Ellis had been Field's counsel for antitrust matters since 1971. Chaffetz immediately headed a team of Kirkland lawyers who studied the matter. On November 17 Arena reported to the board of directors the contacts from CHH about a merger and his inquiry about the antitrust questions to Kirkland & Ellis. He and Rinder were authorized to "sit down with (CHH) and visit with them on a friendly basis", but not to depart from the board's stated position on the matter. The meeting took place in Arena's Ritz Carlton Hotel suite in Chicago on November 18, and it was attended by Carter, Hawley, Arena and Rinder.

Carter and Hawley did most of the talking, with Carter saying at the outset that a merger of Field and CHH was an objective he had pursued for twenty years. He referred to his previous discussions with Field's three former chief executive officers. He pointed out the advantages of such a merger, especially its size, which he and Hawley expected to ultimately grow into a $10 billion a year business. He said that a combination of the two companies would be the best fit in American retailing, making it the most exciting business event in the history of American department stores. Hawley reviewed the comparative worth of CHH and Field. He emphasized the high quality of the department store name which Field represented, one that could be taken anywhere in the country with the possible exception of California, where expansion of Field was not feasible because of CHH's dominance through its four department store divisions. Reference was made to Field's vulnerability to a takeover by other companies, particularly foreign ones. Either Carter or Hawley mentioned the interest of Brenninkmeyer, a foreign company they thought would make Field the object of a takeover. Carter said that this foreign company "might well offer

$60.00 per share (to Field stockholders) at any time."

In response, Arena told Carter and Hawley that he understood there were some antitrust questions in any merger of the two companies. They answered by saying that they had been advised by their attorneys "that there is no antitrust deterrent". They agreed that there existed one overlap in the competitive area of the two companies, the Northbrook Court store of Nieman-Marcus; but that sale could be arranged for that business which at the time had annual sales exceeding $16 million. No mention was made by either Carter or Hawley of their Michigan Avenue site, or their plans to enter the Oakbrook Shopping Mall. The meeting ended with Arena expressing confidence in the future of

Marshall Field, and saying that the question of unfriendly approaches by another company was something Field was living with. Arena emphasized that neither he nor the directors felt that the degree of urgency was as great as CHH was expressing. He concluded the meeting by stating that he and Rinder would report to the executive committee in about two weeks and that the board would meet on December 15, 1977, at which time the subject matter concerning CHH's approach about a merger would be discussed. Arena promised that he would keep them informed of the board's position regarding possible acquisition of Field by CHH. There was no commitment to meet again, or to contact CHH by any particular date.

The subject of the meeting, however,

was not forgotten. On December 2, 1977, Chafftez advised Arena and Rinder that in the opinion of Kirkland & Ellis lawyers, an acquisition of Field by CHH, or a merger of the two companies, would be illegal under the antitrust laws because of (a) the existing competition between Field's stores and the store operated in the Northbrook Court shopping center by CHH's Nieman-Marcus division; (b) the potential competition between Field's stores and the stores on North Michigan Avenue and in Oakbrook which Nieman-Marcus was planning to open; and (c) the existing competition between Field's stores and the stores operated by CHH's Walden Books division. In forming this opinion, Kirkland lawyers relied on the 1976 CHH annual report issued in the spring of 1977, in which the company announced the intention to expand its Nieman-Marcus division and take advantage of the Chicago market. In this report, CHH recognized the splendid market for luxury fashion merchandise on North Michigan Avenue in Chicago, and emphasized its purchase of a large block of land on the avenue for further development. Prior to that report, CHH had in fact acquired property on Michigan Avenue, less than two blocks south of Field's Water Tower Place store, and announced the intention to build a Nieman-Marcus store almost adjacent to the Field location. The lawyers also considered Nieman-Marcus' interest in opening a store in the Oakbrook area, an interest that was publicly disclosed by CHH. In addition, the Kirkland lawyers took into account the fact that Field was the second largest book seller in the Chicago area, while CHH-owned Walden Books was a major factor in the Chicago book selling market. Up to the time that the lawyers formed the antitrust opinion which was conveyed by Chaffetz to Arena and Rinder, CHH had never formulated nor announced a plan for disposal of any of its Chicago stores which did business in competition with Field, a factor crucial to any reasonable antitrust analysis. Chaffetz's report, giving the opinion of Kirkland lawyers, was communicated to Field's directors. The matter remained in that posture until Saturday, December 10, 1977.

On that day, Philip Hawley called Arena and told him that unless Field directors agreed to begin merger negotiations by Monday, December 12, he would deliver and make public a letter proposing that the directors of the two companies enter into negotiations leading to a combination of Field and CHH. He told Arena what the letter would say. Generally, CHH would propose beginning negotiations with the idea that for each share of Marshall Field common stock, CHH would exchange a number of its shares determined by dividing $36.00 by the average closing price of CHH common stock on the New York Stock Exchange during a period of thirty trading days immediately preceding the mailing of proxy statements relating to the transaction, with an election feature which would give Marshall Field shareholders the opportunity to receive up to 49% of the exchange in cash. Appropriate provisions were to be made for holders of Field's preferred stock and those persons who had the right to exercise stock options.

Arena construed what Hawley told him as the initiation of an unfriendly takeover of Field by CHH. Therefore, he immediately reached Joseph Flom in New York and arranged a meeting in the Skadden, Arps office on Sunday, December 11 with key Field directors and investment bankers present. The meeting was held and there was a general discussion about what to do the next day when the letter described to Arena by Hawley was delivered. Arena reported the opinion of Kirkland & Ellis lawyers concerning the legality, under the antitrust laws, of a Field-CHH merger. It was agreed that those directors who were absent were to be polled, by phone, for their authorization that a lawsuit be filed in this court asking for resolution of the antitrust issues which, in the opinion of Kirkland lawyers, were inherent in CHH's proposal for a merger. It was also agreed that the New York Stock Exchange would be informed of the development; and that an emergency meeting of the Field board of directors was to be called for Tuesday, December 13.

Events transpired as anticipated. On Monday, December 12, CHH's letter signed by Hawley was received. The letter, as it turned out, reviewed the advantages of the merger to be negotiated, referred to the gains Field shareholders would derive from the combination of the two companies, and ended with the statement that if Field should decline to meet for the proposed negotiation, CHH "will not be bound by these proposals in any offer or other action which we may elect to pursue in the future". Field directors were contacted by telephone, and all but one approved the filing of an antitrust lawsuit in this court by Kirkland & Ellis.

The special meeting of Field directors took place, as scheduled, on December 13 with all board members present. Also at the meeting were three lawyers from the Skadden, Arps firm: Flom, Aaron and Pelster; Chaffetz of Kirkland & Ellis; and representatives of Field's Company and Smith Barney, Harris Upham & Company, Inc. The lawyers, particularly Chaffetz, gave the directors their opinion concerning the legality of the merger toward which the December 10 letter proposed negotiation, and the investment bankers evaluated the financial aspects of the merger. The CHH letter was reviewed, each director having received a copy by then. Arena, who presided, asked Chaffetz to give his views concerning antitrust implications of a Field-CHH merger. Then Flom and Chaffetz discussed the general legal status of the entire situation, as it then existed. Representatives of the investment bankers presented their report and discussed the financial aspects of the matter.

Questions were asked by board members. Management, represented by Arena and Rinder, made a report and projected the company's expected performance. Generally, the view was that future performance would be favorable. Many of the directors, as did the investment bankers, thought that a share of Marshall Field stock would bring more than $36.00 in a sale or merger of the company. After discussion and consideration, on motion duly made and seconded, the directors unanimously voted to reject the proposal contained in the December 10 letter from CHH because, in their judgment, any merger of Field with CHH would be "illegal, inadequate and not in the best interests of Marshall Field & Company, its stockholders and the communities which it serves". Then the board adopted two resolutions, one ratifying the filing of the antitrust suit and the other giving officers of the company authority to take such action as they deemed necessary in connection with the CHH matter, including the filing of such reports and documents with the SEC and other governmental agencies as may be necessary.

Contemporaneous with their vote, the directors authorized issuance of a release to the press confirming receipt of the December 10 letter, referring to the filing of the antitrust suit alleging that acquisition of Field by CHH would constitute a violation of the federal antitrust laws, and disclosing the advice the directors had received from Kirkland & Ellis on the antitrust questions. Two days later, Arena wrote Hawley a letter telling him of the board's action on his December 10 merger negotiations proposal. On the same day, December 14, Field issued a press release in which Arena spoke for the company and described the board's position on the December 10 CHH letter. He said that Field's directors and management had faith in the momentum of the company, and that "it would be in the best interests of our stockholders, customers and employees for us to take advantage of this momentum and continue to implement our growth plans as an independent company".

The next day, Arena addressed a letter to all Field employees telling them that CHH was "seeking to take over Marshall Field & Company". He reviewed, in general terms, what had transpired, including "the aggressive and insensitive way (CHH has) pursued Marshall Field & Company". On December 20, he addressed a letter to Field stockholders in which he reviewed his observations of the company since assuming the responsibility Burnham had discharged before his death. He spoke optimistically of the future, reviewed Field's immediate past performance, referred to the CHH proposal for negotiation, referred to the advice of antitrust counsel "that a CHH-Marshall Field & Company merger would clearly violate the United States antitrust laws", and concluded that "(y)our Board of Directors believes the maximum benefits for Marshall Field & Company and its stockholders, employees, customers and communities it serves will result from continuing to develop as an independent, publicly-owned Company".

CHH's response to the board's rejection of its proposal was a press release issued January 4, 1978 reporting reaffirmation of the desire of its directors to negotiate a merger with Field. Hawley was quoted as expressing the belief "that a negotiated merger of Carter Hawley Hale and Marshall Field is desirable for both parties and legally possible".

Thereafter, no contact or communication was made by either company concerning the subject of a merger negotiation. The following day, however, Field issued a press release announcing that it had amended the complaint in its antitrust suit against CHH to add allegations of federal securities laws violations said to be connected with CHH's proposed acquisition of Field. Arena was quoted at the end of the release as saying that "our management is continuing the implementation of our long-standing programs to further build and develop the business of Marshall Field & Company. We are confident that all these programs are on course and are optimistic about our progress".

On January 19, 1978, Field directors had their regular meeting. On the agenda was a proposal that the company expand into Texas, and one that it acquire Liberty House Stores, three of which were located in Portland, Oregon, and two in Tacoma, Washington. Field had business operations in the Pacific Northwest through its Fredrick & Nelson division in Seattle, and its The Crescent subsidiary in Spokane. As to the southwest section of the country, Field executives and directors had considered acquisitions in that area. Investment analysts such as Stanley H. Iverson of Duff & Phelps, Inc., a knowledgeable investment advisor who had followed Field's business and market performance for years, had known of the company's general interest in expanding its Chicago division into the southwest area of the country, although no Field executive had ever particularly mentioned Houston, Texas.

The subject of expansion into other parts of the country, and the acquisition of other stores, had been dealt with by Field directors informally at first, and later through a development committee made up of lawyers, representatives of investment banking firms that advised the board, certain Field key executives, and some of the directors. When Flom was retained in 1969, one of the details of his legal advice to the directors and executives was to invest the company's accumulated reserves and adequately utilize its borrowing power in acquiring other stores. Flom advised that at all times such decisions had to be made consistent with sound business judgment, and in the best interest of the company and its shareholders. From his experience as a lawyer who had represented both acquirers and target companies, he told Field executives and directors that acquisitions were a lawful and legal way of coping with an unfriendly takeover. He was critical of the directors and the company's management in not fully exploiting Field's capacity to expand. It was Flom's view, one he expressed to Field's directors and executives when he gave them legal advice, that once, for sound business reasons, the decision was made to resist a takeover, a defensive acquisition was a legal and proper step for a target company to take, provided that the directors' decision to resist a takeover is reasonably related to the interests of the shareholders, the company, and the community it serves. At the December 11 meeting in his office, Flom reminded Field directors, in the presence of Arena, that he had urged them to make more acquisitions, but they had not followed his advice.

Flom was present on January 19 when the proposed expansion and acquisition were before the directors. Arena distributed a report that reviewed the Liberty House Stores, and the discussion that followed was premised on Field's purchase of their inventories, fixtures, and other assets. He told the board that the Tacoma market was clearly a place where the Fredrick & Nelson division should be operating, and Portland was a natural area for that division's operations. He recommended that officers of the company be authorized to enter into a letter of intent pertaining to acquisition of the five stores. The recommendation was approved by unanimous vote of the board and, accordingly, a formal resolution was adopted.

As to the expansion into Texas, Arena introduced the company's vice president for real estate who discussed management's investigation of four possible Texas locations. Specifically, he commented on The Galleria in Houston, Texas, and three others. After considering demographic details and other data, Arena asked that management be given authority to pursue The Galleria in Houston as a future location for a new Marshall Field store. This request was granted unanimously. On January 20, 1978, a letter of agreement for acquisition of the five Liberty House Stores was executed by the parties, and on that day Field announced the acquisition for the purpose of integrating these stores into its Seattle-based Fredrick & Nelson division. Then on February 2, 1978, a letter of agreement was executed for acquisition of a store location, and expansion of its Chicago division, in The Galleria shopping complex in Houston, Texas.

The day before the last letter was signed, Carter Hawley Hale, as required by law, filed documents with the Securities & Exchange Commission and announced its intention to make an exchange offer by which each Field shareholder who wanted to tender his shares would receive, for each share he owned, $42.00 in a combination of cash and CHH stock. The offer, however, could be accepted only after the Securities & Exchange Commission reviewed and declared the registration statement effective, and holders of a majority of outstanding CHH capital stock approved the offer at a shareholder's meeting to be held on an undetermined date in the future. Further, CHH's intention to make the offer was subject to the condition that if holders of 5% or more of its common stock dissented, they would be entitled to receive what their shares were worth on January 31, 1978, and at that time, CHH would have the option of withdrawing the offer.

Formal notice of this filing was served on Field directors, its president, law vice president and secretary. At a special meeting of the board on February 2nd, CHH's filing was dicsussed, its legal implications described to the directors by Aaron of the Skadden, Arps firm, and by Hammond Chaffetz of Kirkland & Ellis. In addition, Chaffetz brought the directors up to date on developments in the Field suit then pending in this court. Then, the directors took up a number of proposed acquisitions, including The Galleria in Houston, Texas. There was no mention of the adequacy or the inadequacy of the $42.00 per share price which CHH announced it intended to pay sometime in the future for each share of Field stock. After the board meeting, Field issued a press release in which Arena said that the company's "opposition to the takeover bid by Carter Hawley Hale is unchanged". The release concluded with the statement by Arena that "I assumed my

> position with Marshall Field & Company with the understanding that I would devote myself to making Marshall Field & Company a truly national retail business organization. We at Marshall Field & Company are determined not to be deterred

from this course. Our recently announced agreement to acquire five Liberty House Stores in Tacoma, Washington and Portland, Oregon, was one step in our program".

No other communication occurred bewteen the parties until February 22, 1978. Before that, on February 8, Arena announced, in a press release, that Field had concluded negotiations for a 200,000 square-feet, full line department store to be located in The Galleria complex, Houston, Texas. Then on February 22, CHH informed Field and the public that it was withdrawing its proposed exchange offer because "the expansion program announced by Marshall Field since February 1st has created sufficient doubt about Marshall Field's earning potential to make the offer no longer in the best interest of Carter Hawley Hale's shareholders". None of the events that conditioned CHH's intention to make the offer had occurred since February 1, 1978. It had not purchased any Field's shares; no Marshall Field shareholder was ever solicited to sell any share owned; no publicity was engaged in either by CHH or by Field concerning solicitation of Marshall Field shares; and no opportunity was ever given to any Field shareholder to tender any share he owned in Marshall Field & Company.

II.

These, then, being the facts in most favorable to the plaintiff which this court's judgment the jury can reasonably find from the evidence, defendants' motion for a directed verdict[11] presents a question of law: whether when all the evidence is considered, together with all reasonable inferences favorable to the plaintiffs, it totally fails to prove a necessary element of their case. Riggs. v. Penn Central Railroad Company, 442 F. 2d 105, 106 (7th Cir. 1971). It is recognized and the court bears this in mind, that since a directed verdict will deprive plaintiffs of a determination of the facts by the jury, a motion therefor should be sparingly granted. Farner v. Paccar, Inc. 562 F. 2d 518 (8th Cir. 1977); Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F. 2d 746 (7th Cir. 1979). Nevertheless, if the facts and inferences point so strongly and overwhelmingly in favor of defendants that the court is convinced reasonable men cannot arrive at a verdict contrary to one in their favor, granting of the motion is proper. Boeing Company v. Shipman, 411 F. 2d 365, 374 (5th Cir. 1969); see Neugebauer v. A.S. Abell Co., 474 F. Supp. 1053 (D.Md. 1979). The rule is well established that when the evidence in a case is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict to be reached, a district judge should determine the proceeding by directing the verdict, without submission to the jury; such direction will have the result of saving the mischance of speculation over legally unfounded claims. See Brady v. Southern Ry. Co. 320 U.S. 476, 479-80, 64 S. Ct. 232, 234, 88 L.Ed. 239 (1943); 9 Wright & Miller, Federal Practice and Procedure §2524 (1971). As the court of appeals for this circuit has held, a district judge should direct a verdict where the evidence, with all justifiably deducible inferences, will not support a verdict in favor of the party producing it. Hohmann v. Packard Instrument Company, Inc., 471 F 2d 815, 819 (7th Cir. 1973). Whether, in this case, a verdict should be directed is determined by the law that controls the controversy between the parties, law which this court would instruct the jury it must follow if asked to deliberate and reach a verdict.

III.

A. PLAINTIFFS' SECTION 10b AND RULE 10b-5 CLAIMS

The statute under which plaintiffs make these claims, Section 10b of the Securities & Exchange Act of 1934, 15 U.S.C. §78j(b), provides that "[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange...

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, adopted by the Securities and Exchange Commission and published in 17 C.F.R. §240.10b-5 (1977), states that:

*

> (a) To employ any device, scheme, or artifice to defraud,

* It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Based upon this statute and rule, plaintiffs seek to recover as members of a class of "persons who held common stock of Marshall Field & Company at any time between December 12, 1977 and February 22, 1978." This class, prior to trial, was divided into four subclasses consisting of (1) persons who held Field's stock on or prior to December 12, 1977 and disposed of it after that date but prior to February 22, 1978; (2) persons who acquired Field's stock after December 12, 1977 and disposed of it prior to February 22, 1978; (3) persons who acquired Field's stock after December 12, 1977 and did not dispose of it prior to February 22, 1978; and (4) persons who held Field's stock on or prior to December 12, 1977 and did not dispose of it prior to February 22, 1978.

Plaintiffs contend, from the evidence heard, that between October 11, 1977 and February 28, 1978, when CHH withdrew its proposed exchange offer, defendants as directors of Marshall Field had a policy of keeping the company an independent business entity, a policy formulated years before, that this policy was not disclosed to Field shareholders who made investment decisions in purchasing or selling Marshall Field shares; that during the period in question, defendants made material mis-statements in press releases and letters designed to influence investment decisions by the shareholders; that they omitted making material disclosures concerning the policy they were administering as Field directors; that on or about December 13, 1977, defendants arbitrarily rejected a proposal made by Carter Hawley Hale for negotiation of a merger with Field; and that in doing these things, defendants engaged in manipulative, deceptive, and fraudulent conduct, knowingly recklessly, and with full knowledge of the consequences to the rights of the plaintiffs-shareholders affected. Plaintiffs insist that the evidence now in the record shows defendants made defensive acquisitions by which they succeeded in depriving Field stockholders of the opportunity to sell their shares at an advantageous price. These acts of the defendants, according to the plaintiffs, were committed, not in the interest of Field shareholders, but solely to perpetuate themselves in office as directors of the company.

The evidence shows that all of the corporate decisions about which plaintiffs complain were made by defendants in their capacity as directors of Marshall Field. It is the law, which the jury would have to follow were it to deliberate to a verdict, that the general authority and power of defendants as Field directors during the period in question was to manage the corporate business and affairs for the stockholders and their authority at all times was absolute, as long as they acted within the law. Questions of policy and internal management were, in the absence of nonfeasance, misfeasance or malfeasance, left wholly to their decision. 5 Fletcher, Cyclopedia of Law of Private Corporations §2100 (1976 rev. vol.); see SHLENSKY V. WRIGLEY, 95 Ill.App.2d 173, 237 N.E.2d 776 (1968). The laws of the State of Delaware governing the powers of corporate directors give defendants this authority. See Del. Code Tit. 8, § 141(a). Directors of a publicly owned corporation do not act outside of the law when they, in good faith, decide that it is in the best interest of the company and its shareholders that it remain an independent business entity. Lipton, TAKEOVER BIDS IN THE TARGET'S BOARDROOM, 35 The Business Lawyer 101, 130 (1975). Having so determined, they can authorize management to oppose offers which, in their best judgment are detrimental to the company and its shareholders. NORTHWEST INDUSTRIES, INC. v. B. F. GOODRICH COMPANY, 301 F. Supp. 706, 712 (N.D.Ill.1969). Certainly acquisitions, expansions, and the purchase of new stores are management decisions which, even though some shareholders may consider them breaches of fiduciary duty, are not grounds for liability under Section 10b or Rule 10b-5 unless there is deception, misrepresentation, or nondisclosure in violation of the statute and the rule. SANTA FE INDUSTRIES, INC. v. GREEN, 430 U.S. 462, 476, 97 S.Ct. 1292, 1302, 51 L.Ed.2d 480 (1977).

These principles have to be considered together with another well settled rule. There can be no violation of Section 10b or Rule 10b-5 unless evidence establishes that the person or persons charged with such violation committed three acts in connection with the transaction in question: (1) used the mail or other instrumentality of interstate commerce; (2) purchased or sold a security, or sought to affect the same; and (3) used a manipulative or deceptive device. See OLYMPIC CAPITAL CORPORATION v. NEWMAN, 276 F.Supp. 646, 653 (C.D.Cal. 1967); accord CAMERON v.

OUTDOOR RESORTS OF AMERICA, INC., 608 F.2d 187 (5th Cir. 1979) and SECURITIES & EXCHANGE COMMISSION v. DIVERSIFIED INDUSTRIES, 465 F.Supp. 104 (D.D.C. 1979). The term "purchase or sale" as used in the section and rule is not limited to common law transactions. SPECTOR v. L.Q. MOTOR INNS, INC., 517 F.2d 278, 285 (5th Cir. 1975), CERT. DENIED 423 U.S. 1055, 96 S.Ct. 786, 46 L.Ed.2d 644; SEE ANNOT. 4 A.L.R.Fed. 1048. Exchange of shares in connection with the merger or sale of corporate assets constitutes a purchase or sale within Section 10b and Rule 10b-5. SECURITIES & EXCHANGE COMMISSION v. NATIONAL SECURITIES, 393 U.S. 453, 467, 89 S.Ct. 564, 572, 21 L.Ed.2d 668 (1969); SWANSON v. AMERICAN CONSUMER INDUSTRIES, INC. 415 F.2d 1326, 1330 (7th Cir. 1969).

More importantly, in all such cases, the evidence must prove that the person or persons engaged in such sale or purchase, as defined, did so with intent to deceive, manipulate or defraud. ERNST & ERNST v. HOCHFELDER, 425 U.S. 185, 193, 96 S.Ct. 1375, 1380, 47 L.Ed.2d 668 (1976). The expression "any manipulative or deceptive device or contrivance," used in the statute and found in the rule, proscribes knowing or intentional misconduct. See SECURITIES & EXCHANGE COMMISSION v. TEXAS GULF SULPHUR CO., 401 F.2d 833, 868 (2nd Cir. 1968) (Friendly, J., concurring), CERT. DENIED 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969); Loss, SUMMARY REMARKS, 30 Business Law 163, 165 (special issue 1975). This is conduct quite different from negligence. "Use of the word "manipulative" is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." ERNST & ERNST v. HOCHFELDER, SUPRA at 199, 96 S.Ct. at 1384; see KLAMBERG v. ROTH, 473 F. Supp. 544, 549 n.8(S.D.N.Y. 1979); ANNOT. 3 A. L. R.Fed. 819.

In this case, there is no evidence from which the jury could find that during the period relevant to this controversy any defendant engaged in the purchase or sale of any security, no matter how the term is defined. Additionally, while it is true that Marshall Field shares have always been sold on the open market, there is no evidence that in making their managerial decisions as to remaining independent, making acquisitions, and expanding the business of Marshall Field, defendants in any way acted with intent to deceive investors by controlling or artificially affecting the price of securities. Cf. ERNST & ERNST v. HOCHFELDER, SUPRA 425 U.S. at 199, 96 S.Ct. at 1383.

The law and evidence, particularly the minutes of the meeting of Field's directors and the letters and press releases of defendants in response to merger proposals and the proposed exchange offer, simply do not support plaintiffs' allegations that the defendants violated Section 10b or Rule 10b-5 by intentionally and deceptively failing to disclose their policy of remaining independent so as to manipulate the price of the company's stock. Therefore, plaintiffs' evidence does not present a jury question on their claims under Section 10b or under Rule 10b-5. See SANDERS v. JOHN NUVEEN & CO., INC., 554 F.2d 790 (7th Cir. 1977).

B. PLAINTIFFS' SECTIONS 14(d) and 14(e) CLAIMS

The provisions of law plaintiffs here invoke are two of the 1968 amendments to the Securities & Exchange Act of 1934, sometimes collectively referred to as the "Williams Act", and are found in 15 U.S.C. § 78n(d-f). BATH INDUSTRIES, INC. v. BLOT, 427 F.2d 97 (7th Cir. 1970). Section 14(d) prohibits the making of a tender offer for any class of a registered stock if, after consummation, the offeror would own more than five percent of the class, unless a Schedule 13D form is first filed with the Securities & Exchange Commission. KENNECOTT COPPER CORP. v. CURTISS-WRIGHT CORP., 584 F2d 1195, 1205-1206 (2d Cir. 1978). Section 14(e), on which plaintiffs particularly rely in this case, provides that

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any

> material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fradulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

The sole purpose of Congress in adopting these amendments "was the protection of of investors who are confronted with a tender offer." PIPER v. CHRIS-CRAFT INDUSTRIES, INC., 430 U.S. 1, 35, 97 S.Ct. 926, 946, 51 L.Ed.2d 124 (1977). The Williams Act amendments were intended "to insure that the public shareholders who are confronted by a cash tender for their stock will not be required to respond without adequate information." RONDEAU v. MOSINEE PAPER CORP., 422 U.S.

49, 58, 95 S.Ct. 2069, 2076, 45 L.Ed.2d,12 (1975). The critical phrase in Section 14(e) is "in connection with any tender offer". LEWIS v. McGRAW, [Current Binder] Fed.Sec.L.Rep (CCH) ¶97,195 (S.D.N.Y.1979). Therefore, in order for Sections 14(d) and 14(e) to become operative, there must be an exchange or tender offer, or at least the announcement of one, because when "a public announcement of a proposed offer has been made, the very dangers that the Act was intended to guard against come into play, and the application of sections 14(d) and 14(e) is thus appropriate." APPLIED DIGITAL DATA SYSTEMS, INC. v. MILGO ELECTRONIC CORP., 425 F.Supp. 1145, 1155, (S.D.N.Y. 1977);Cf. CORENCO CORP. v. SCHIAVONE & SONS, INC., 488 F.2d 207 (2d Cir. 1973). In view of plaintiffs' emphasis of this securities law concept, it is necessary that the term "tender offer" is defined.

Neither the Williams Act nor the rules adopted by the Securities & Exchange Commission attempt to define these words. However, from judicial decisions and scholarly works, it can be seen that a tender or exchange offer may be any proposal, by an individual, group or corporation, made through public announcements or other means of communication, to purchase securities made in a manner "likely to pressure shareholders into making uninformed, ill-considered decisions to sell." Note, THE DEVELOPING MEANING OF "TENDER OFFER", 86 Harv.L.Rev. 1250, 1281 (1973) quoted in KENNECOTT COPPER CORP. v. CURTISS-WRIGHT CORPORATION, 449 F.Supp. 951, 961 (S.D.N.Y. 1978), aff'd in part, rev'd in part, 584 F2d 1195 (2d Cir. 1978); see E. AARNOW, H. EINHORN & G. BERLSTEIN, DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL, 1-34 (1977). The offer must be stated in terms which will induce the tender of shares by shareholders who wish to sell.

The evidence at the close of plaintiffs' case shows that in the month of October 1977, Edward Carter and Philip Hawley of Carter Hawley Hale made approaches to Field about the possibility of a merger between the company and CHH. Under the laws of Delaware which govern the issue here, a merger proposal to Field had to be approved by defendants, as directors, before it could be presented to the shareholders. See Del. Corp. Law §251. The courts of that state give directors of Delaware corporations the benefit of a presumption that their judgment in dealing with any plan of merger is made in good faith and attributable to a rational business purpose. E.g., MUSCHEL v. WESTERN UNION CORPORATION, 310 A.2d 904, 909 (Del.Ch.

1973). Acting on their authority, therefore, defendants asked Angelo Arena and George Rinder to meet with Carter and Hawley and discuss what they had in mind. A day or so before going to the meeting, Arena had talked with Field's antitrust counsel concerning possible antitrust violations in the merger Carter and Hawley were thinking about. It appears to be without question that had there been a merger of CHH and Field, it would have been the largest one in the history of department stores in this country. There were reasons to believe that antitrust issues existed. CHH was a Field competitor in the Chicago market; its announced plans were to expand that competition.

At the meeting, Arena brought up the possibility of antitrust violations; Carter and Hawley insisted there were none. When Arena said he understood the contrary, one or the other of the two men replied, giving the views of "their attorneys that there is no antitrust deterrent" to the merger they had in mind. They said that the one overlap, Nieman-Marcus' Northbrook Court store, could be sold because it was a highly successful operation. This disposition, they thought, would cure any antitrust problem. No mention was made of the Michigan Avenue site nor of CHH's announced plans to enter the Oakbrook shopping mall. The meeting ended on a friendly note with no understanding of further contacts.

Three days later, Rinder met with two Kirkland & Ellis lawyers, discussed with them the antitrust implications of a Field-CHH merger, and directed that they be furnished information and data that had been requested. Then, on December 2, Hammond Chaffetz, who had headed the Kirkland & Ellis research into the antitrust questions, gave Arena the opinion of the lawyers. Chaffetz stated that after studying the market operations of the two companies, he and his colleagues had concluded that any merger of Field and CHH would violate the federal antitrust laws. It is reasonable to infer that the substance of Arena's conversation with Chaffetz was conveyed to defendants; and that from the origin of Carter's contact on October 11 to December 13, 1977, the general subject of a merger of Field and CHH was studied and considered by defendants, the lawyers who advised them, Field executives, the company's investment bankers, and the accountants.

On December 10, 1977, Arena received a telephone call from Hawley. That day, as any juror would notice since jurors are good at noticing a mundane fact like this one, was a scant two weeks from Christmas. Field was in the midst of the most important shopping period of the business year, with Arena just becoming adjusted to his new position as its chief executive officer. Hawley told Arena that unless defendants authorized the immediate beginning of merger negotiation discussions with CHH, he would deliver and make public on December 12 a letter outlining a proposal he and Carter had in mind. Hawley knew the impact of this threat on Arena, on Field, its directors and management. He also knew that public announcement of merger possibilities would influence transactions of Marshall Field shares on the exchanges. Arena was also aware of these consequences. He proposed to Hawley that he appear and discuss the subject of his telephone call at a special meeting of Field directors the following week. Hawley declined, saying that a meeting with the directors was not what he had in mind; he wanted the beginning of merger negotiations. The telephone conversation ended with the understanding that the letter would be delivered Monday, December 12.

Arena reacted by calling Joseph H. Flom, the lawyer for corporate matters that Field's directors had retained in 1969. They agreed to meet at the Skadden, Arps law firm office the next day in New York City. The meeting was held, attended by representatives of Field's investment bankers and key directors. Flom reviewed the advice he had given Field through the years. Arena reported the opinion of Kirkland & Ellis lawyers that a Field-CHH merger would violate the federal antitrust laws. It was decided among those present that the stock exchanges would be informed of the impending letter from Hawley and that a suit would be filed by Field against CHH in this court on Monday, December 12. These things were done and, on December 13, Field's directors, each having received a copy of the letter Hawley had described to Arena, held a special meeting. Present were lawyers from Kirkland & Ellis and from Skadden, Arps. Representatives from two firms of investment bankers appeared and gave their view on the subject of the CHH letter. Management representatives expressed views concerning the future of Field, on the whole favorable. Hammond Chaffetz of Kirkland & Ellis discussed in detail the reasons for the opinion he and his colleagues had reached on the antitrust issues present in any proposal to merge Field with CHH.

At the conclusion of the meeting, the directors unanimously decided to reject the proposal contained in the December 10 letter because in their judgment it was "illegal, inadequate and not in the best interests of Marshall Field & Company, its shareholders and the communities which it serves." The next day Hawley was advised of the board's decision by letter and, at the same time, a press release was issued giving the reasons for the board's actions, referring to the law suit that had been filed on December 12, and quoting Arena as saying that the directors believed "it would be in the best interests of our stockholders, customers and employees for us to take advantage of [the momentum of the company's future] and continue to implement our growth plans as an independent company." Thereafter, defendants authorized officers of the company to proceed with the Liberty House Stores acquisition and with negotiations for a department store location in The Galleria complex, Houston, Texas.

Plaintiffs argue that their evidence showing this course of conduct requires defendants to put on a defense because it has been proven, prima facie, that they made untrue statements of material facts, they omitted stating material facts, and engaged in fraudulent, deceptive, or manipulative acts or practices when they rejected the proposal contained in CHH's letter of December 10. Plaintiffs say that they have shown that defendants filed documents with the Securities & Exchange Commission, issued press releases, and wrote letters to employees and shareholders all of which contained untrue statements or material omissions. Plaintiffs insist that, prima facie, they have proven defendants filed the antitrust suit and made acquisitions of other businesses after December 10, not in the interest of Marshall Field and its shareholders, but, rather, in support of their undisclosed policy of keeping Field an independent business entity and perpetuating themselves in office as directors of the company. Plaintiffs contend their evidence shows defendants violated Sections 14(d), 14(e), and rules promulgated by the Securities & Exchange Commission; and thus, the motion for directed verdict should be denied.

These contentions overlook the fact that sections 14(d) and 14(e) of the Williams Act apply only to conduct committed in connection either with a tender or an exchange offer, S-G SECURITIES, INC. v. FUGUA INVESTMENT CO., 466 F.Supp. 1114 (D.Mass.1978); see Annot. 6 A.L.R.Fed. 906, or where there has been a public announcement of an intention to make one. APPLIED DIGITAL

DATA SYSTEMS v. MILGO ELECTRONIC, 425 F.Supp. 1145 (S.D.N.Y. 1977). The letter of December 10 was neither an exchange nor a tender offer, nor was it a public announcement concerning one. In fact, it was not even a merger proposal; it was only a request, shielded in a threat, that defendants and Field executives interrupt the company's business and engage in merger negotiations with CHH.[12] Therefore, there was no schedule or form which defendants had to first file with the Securities & Exchange Commission as required by Section 14(d); and clearly, their conduct with regard to CHH's proposal, was not "in connection with a tender offer" within the meaning of Section 14(e) of the Williams Act. This was also true of the proposed exchange offer CHH announced on February 1, 1978 when it made the Schedule 14D-1 filing with the Securities & Exchange Commission. The reasons, however, are different. A tender or exchange offer must be so expressed that "[t]he person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met [by the shareholder]." H.R.Rep. No. 1711, 90th Congress 2d Sess., reprinted in [1968] U.S. Code Cong. & Admin.News, p.2811; KENNECOTT COPPER CORP. v. CURTISS-WRIGHT CORP., 584 F.2d 1195, 1206 (2dCir.1978). It can be made by issuance of a public announcement stating that after appropriate steps have been taken to comply with federal securities laws, and after securing authorization of the offeror's stockholders, the tender or exchange offer will be made directly to the target shareholders. APPLIED DIGITAL DATA SYSTEMS v. MILGO ELECTRONIC, 425 F.

Supp. 1145 (S.D.N.Y 1977). A person is not obligated to purchase all or a specified portion of tendered shares if the offer is subject to a condition precedent, that is, "a fact or event which the parties intend must exist or take place before there is a right to performance." 5 Williston on Contracts 126,§663 (3ded.); Restatement of the Law, Contracts §250; UNITED STATES v. SCHAEFFER, 319 F.2d 907, 911 (9th Cir. 1963), CERT. DENIED 376 U.S. 943, 84 S.Ct. 798, 11 L.Ed.2d 767 (1964).

CHH's proposed offer was subject to more than approval by the Securities & Exchange Commission and by holders of a majority of the shares of CHH capital stock. It was also subject to the condition that if holders of 5% or more of CHH shares formally dissented to the making of the exchange offer, they would be entitled to receive what their shares were worth the day before CHH announced its proposal; and upon the happening of that event, CHH would have the option of either proceeding with or withdrawing the making of the proposed offer. From February 1, 1978 when the proposed offer was announced, until February 22 when it was withdrawn, however CHH did not proceed before the Securities & Exchange Commission to obtain the required approval of its intended offer, it did not call a meeting of its shareholders, and it never ascertained what percent of its shareholders would dissent from the making of the exchange offer. In addition to these conditions which were not met, CHH hedged its proposed exchange offer with nine other conditions precedent, none involving the mere passage of time and only one subject to CHH's control. None of these conditions were met, either, but defendants did nothing to prevent their occurrence or to prevent CHH from effectuating their occurrence. It is clear, also, that at no time did CHH purchase any Field shares, nor did it in any way solicit or urge any Field shareholder to sell. Consequently, in this court's judgment, CHH's announcement of February 1 and the SEC filing it made were not and never became an exchange offer.

But even if a contrary conclusion were reached on this point, the evidence shows that during the period in question defendants never made any untrue statement of a material fact or omitted the stating of any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; nor did they engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender or exchange offer or request or invitation for tenders or exchanges, or any solicitation of security holders in opposition to such offer, request or invitation. Defendants' only response to CHH's announcement of February 1 was a press release the same day, in which no reference was made to the proposed offer. Arena, as president and chief executive officer of Marshall Field, again reiterated defendants' acceptance of legal advice which told them that any combination of the two companies would violate United States antitrust laws. He referred to the conditions imposed on the proposed exchange offer by CHH. The release concluded with references to the acquisitions Field was making, and was intending to make in the future, and his determination to pursue "making Marshall Field & Company a truly national retail business organization." Neither at the board meeting held that day, nor at any other time, did defendants express any view concerning the adequacy of the proposed exchange offer. They did not solicit shareholders to either accept or reject the offer. Under these circumstances, the evidence at the close of the plaintiffs' case shows that they cannot prevail on the claims they made under sections 14(d) and 14(e) of the Williams Act. See BERMAN v. GERBER PRODUCTS CO., 454 F.Supp. 1310 (W.D.Mich.1978); ALTMAN v. KNIGHT, 431 F.Supp. 309 (S.D.N.Y. 1977).

C. PLAINTIFFS' STATE LAW CLAIMS

Based on the same occurrence and same events on which they sue under Section 10b, Rule 10(b) 5, and sections 14(d) and 14(e) of the Williams Act, plaintiffs claim, and insist their evidence shows, that defendants, as directors, breached their fiduciary duties owed to plaintiffs as shareholders of Marshall Field by maintaining a policy of keeping Field independent, making acquisitions to thwart takeovers they feared would deprive them of their directorships, making misleading statements which included omitting important disclosures, and filing the antitrust suit against CHH. Plaintiffs contend they have proven that defendants rejected CHH's approach concerning a merger, not in the best interest of Field shareholders, but only to preserve their positions as directors of the company. They insist that the hasty and ill-considered decision of defendants deprived them of the opportunity to sell their shares at a premium, first at the suggested figure of $36.00, then at the $42.00 price announced by CHH in its proposed exchange offer.

These claims are based on fiduciary principles discussed by the courts of Delaware in BROPHY v. CITIES SERVICE CO., 31 Del.Ch.241, 70 A.2d 5 (1949) and SINGER v. MAGNAVOX CO., 380 A.2d 969 (Del.Supr. 1977). Since Field is a Delaware corporation, this court must apply the law of that state in determining whether defendants as directors of a corporation have breached any fiduciary duty they owed to the plaintiffs. DAVIDGE v. WHITE, 377 F. Supp. 1084, 1088 (S.D.N.Y.1974); see SCOTT v. MULTI-AMP CORPORATION, 386 F. Supp. 44 (D.N.J.1974). After reviewing the evidence and the law this court has concluded, as a matter of law, that at the close of their case in chief, plaintiffs have not produced evidence which would prove essential elements of the claims they have made under the federal securities statutes and rules. Despite this conclusion, but without deciding whether the federal claims were not insubstantial, the court is of the view that it should exercise its discretion, retain pendent jurisdiction, and determine whether, as to their state law claims, plaintiffs have made a prima facie case. PARRENT v. MIDWEST RUG MILLS, INC., 455 F.2d 123, 129 (7th Cir. 1972); cf. ROUSSEFF v. DEAN WITTER & CO., 453 F.Supp. 774 (N.D.Ind.1978); see FOREST LABORATORIES, INC. v. PILLSBURY COMPANY, 452 F.2d 621 (7th Cir.1971); UNITED STATES EX REL. CROW CREEK SIOUX TRIBE v. TRI-COUNTY BANK OF CHAMBERLAIN, SOUTH DAKOTA, 415 F.Supp. 858 (D.S.D. 1976).

The chancellors of the state of Delaware have said that "[t]here is no rule better settled in the law of corporations than that directors in their conduct of the corporation stand in the situation of fiduciaries." BODELL v. GENERAL GAS AND ELECTRIC CORPORATION, 15 Del.Ch.119,132A. 442,446 (1926)aff'd 15 Del. Ch.420,140A. 264(1927);see GUTH v. LOFT, INC.,23 Del.Ch.255,5 A.2d 503,510(1939). As fiduciaries, directors owe to the corporation and its shareholders the duties of honesty, loyalty, good faith, diligence and fairness; they must act for the benefit of the corporation and its shareholders, and never use their fiduciary positions to further their personal interests. SINGER v. MAGNAVOX CO., 380 A.2d 969 (Del.1977). It follows, as a corollary, that corporate directors who negligently waste the assets of the company in buying stock of another corporation, and thus interfere with the rights of shareholders, commit breaches of their fiduciary duties. PENN MART REALTY COMPANY v. BECKER, 298 A.2d 349 (Del. Ch.1972); cf. MICHELSON v. DUNCAN, 407 A.2d 211 (Del.Supr.1979).

In a background memorandum filed to aid the court in understanding their underlying litigation theory in eight of the nine consolidated cases, plaintiffs argue that as to the question of liability of entrenched management that resists takeover attempts solely to perpetuate itself in office, the leading case is CONDEC CORPORATION v. LUNKENHEIMER COMPANY, 43 Del.Ch. 353, 230 A.2d 769, 775, 776(1967). After a descriptive statement of what they understood was involved, plaintiffs conclude that "[a]lmost identical [with Condec] are the facts in the instant case."

In their memorandum objecting to defendants' motion for directed verdict, they again cite CONDEC CORPORATION v. LUNKENHEIMER COMPANY and say it holds that "[w]here directors have taken actions otherwise lawful but for an improper motive, such as resisting the acquisition of their corporation out of a desire to perpetuate the present directors' control, Delaware law holds that the directors have breached their fiduciary duty and are outside the protection of the business judgment rule." In view of this reliance on CONDEC v. LUNKENHEIMER, this court will examine that decision in order to determine whether, as plaintiffs contend, it controls the issues at bar.

CONDEC was a case in which a Delaware court of chancery heard a motion to restrain the use of 75,000 authorized but unissued shares of a target corporation in a way which would have prevented the plaintiff, a tender-offeror, from exercising its rights as a minority shareholder of the target company. Lunkenheimer Company directors, for reasons they could not justify at the hearing for preliminary relief, had rejected Condec's approach toward a merger; but, not to be undone, Condec, through two tender offers, succeeded in obtaining tenders for 191,017 shares of Lunkenheimer stock, a total of 414,000 then being outstanding. It became clear to Lunkenheimer that Condec was going to acquire enough shares to control the company. To prevent this, but without any benefit to the company and its shareholders, Lunkenheimer entered into an agreement with a subsidiary of a company that had evinced an interest in acquiring all of Lunkenheimer's assets, an interest Lunkenheimer approved, whereby it issued to the subsidiary 75,000 shares. The terms of the agreement were such that no money was paid; the sole purpose of the issuance was to thwart Condec's efforts to complete its tender offer and control the company. Without hearing more, the chancellor ruled that a final order would be entered cancelling the 75,000 shares of Lunkenheimer stock.

CONDEC CORPORATION v. LUNKENHEIMER is the law of Delaware; see YOUNG v. VALHI, INC., 382 A.2d 1372, 1379 (Del.Ch.1978); it is cited by Delaware chancellors for the propositions that "shares may not be issued solely to preserve or to gain corporate control" and "corporate action, though technically correct and in compliance with Delaware Corporation Law, may not be undertaken for in inequitable purpose." LYNCH v. VICKERS ENERGY CORPORATION, 351 A.2d 570, 575 (Del.Ch.1976), rev'd on other grounds, 383 A.2d 278 (Del.Supr.1977). In

Delaware, a majority of shareholders of a corporation owes a fiduciary duty to the minority. ROLAND INTERNATIONAL CORPORATION v. NAJJAR, 407 A.2d 1032 (Del.Supr.1979). Obviously, it is inequitable, and hence a breach of fiduciary duties, for a corporation acting at the instigation of a majority of its shareholders to issue stock, without consideration, solely to prevent a minority shareholder from completing a tender offer that is proceeding in accordance with the law. Clearly, CONDEC is distinguishable as to parties, facts, issues, and relief sought. Nothing of the kind that happened in that case is shown in the evidence which plaintiffs have produced in this one.

What plaintiffs have shown is that in each instance when a contact or approach was made to Field concerning an acquisition of it by another company, or a possible merger, the proposition was considered by defendants on its merits. Each contact or approach was made a part of the company's records by signed or initialed memoranda, with defendants' actions recorded in board minutes containing appropriate resolutions. Defendants reached their decision as to each approach or contact only after consulting with management, lawyers, accountants, and investment bankers. For reasons that were applicable to each occasion, defendants decided that the suggested acquisition or proposed merger was not in the best interest of Marshall Field, its shareholders, and communities served by the company. These were decisions made in the exercise of business judgment.

The same process, the evidence shows, occurred in connection with the approach made by Carter and Hawley in

October 1977. The important difference was the timing of it, and the insensitivity represented by the fact that representatives of CHH appeared to be taking advantage of the death of an important Field executive, and trying to exploit defendants' employment of Arena, who had just left CHH. There were valid reasons to believe that any merger of Field with CHH would violate the antitrust laws, and the subject, over a period of more than a month, was studied and discussed by Field executives with qualified lawyers. It is true that neither defendants nor the lawyers they consulted communicated with the law firm Carter and Hawley had mentioned; but this was a matter of judgment. Defendants did not breach any fiduciary duty they owed plaintiffs when they acted on the CHH approach.

It is worth remembering that

according to plaintiff's evidence, defendants had never told anyone they were interested in a merger with CHH, or that Field was for sale. Corporations in the kind of business as important as that in which Marshall Field was engaged plan to exist as on-going commercial or merchandising entities. Plaintiffs appear to believe that large companies like Field are developed for takeovers; and that seeing to shareholder opportunities for sale of their shares at a premium is the most important duty of directors who manage publicly owned corporations. Plaintiffs are mistaken; for if they were not, public equity ownership in corporations would be a form of entreprenuerial hazard that few corporations could survive.

As to the acquisitions which defendants authorized Field management to make, Halle's, The Liberty House

Stores, and The Galleria in Houston, Texas, each was consummated after defendants considered business projections by management received the advice of lawyers and experts, and consulted with accountants and investment bankers. Despite a great deal of straining with financial data, reports and statistics, plaintiffs have not produced evidence which could prove that any of these acquisitions were unsound business ventures.

The lawsuit Field filed against CHH was authorized by defendants only after they had considered the advice of competent legal counsel who, according to evidence shown to the jury, had reasonable grounds for the litigation that was contemplated. Directors of corporations are entitled to rely in good faith on the advice of experts, including that of legal counsel. SPIRT

v. BECHTEL, 232 F.2d 241, 247 (2d Cir. 1956); VOEGE v. MAGNAVOX CO., 439 F.Supp. 935, 942 (D.Del.1977). The suit was proper; defendants had in good faith and in the exercise of business judgment decided that CHH's proposal toward a merger was illegal, inadequate, and not in the best interests of Marshall Field, its shareholders, and the communities it serves.

Directors of corporations discharge their fiduciary duties when in good faith they exercise business judgment in making decisions regarding the corporation. WARSHAW v. CALHOUN, 221 A.2d 487 (Del.Supr.1966); GIMBEL v. SIGNAL COMPANIES, INC., 316 A.2d 599, 609 (Del.Ch.1974) aff'd 316 A.2d 619 (Del.Supr.1974); see S. Kaplan, Fiduciary Responsibility in the Management of the Corporation, 31 Business Law 883 (1976). When they act in good faith, they enjoy a presumption of sound business judgment, reposed in them as directors, which courts will not disturb if any rational business purpose can be attributed to their decision. KAPLAN v. GOLDSAMT, 380 A.2d 556, 568 (Del.Ch. 1977). In the absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not interfere with the exercise of business judgment by corporate directors. SINCLAIR OIL CORPORATION v. LEVIEN,280 A.2d717,722 (Del.Supr.1971); WARSHAW v. CALHOUN,221 A.2d 487(Del.Supr.1966). There is no evidence in this record on which the jury could find that at any time any defendant in this case committed fraud, was guilty of bad faith, grossly overreached, or abused his discretion in dealing with any property or right of any plaintiff, or a member of the class or subclasses.

Corporate directors have the duty to oppose a takeover offer which they have determined would be detrimental to the interests of the corporation and its shareholders. TREADWAY COMPANIES v. CARE CORPORATION [Current Binder] Fed. Sec.L.Rep (CHH) ¶97,188 (S.D.N.Y.1979). Having so decided in good faith, with rational business purposes attributable to their decision, defendants had not only the right "but the duty to resist by all lawful means persons whose attempt to win control of the corporation, if successful, would harm the corporate enterprise." HEIT v. BAIRD, 567 F.2d 1157, 1161 (1st Cir.1977); NORTHWEST INDUSTRIES, INC. v. B. F. GOODRICH CO., 301 F.Supp. 706, 712 (N.D.Ill.1969); CHEFF v. MATHES, 41 Del.Ch. 494, 199 A.2d 548 (Del.Supr.1964).

IV.

For these reasons, as they have been stated by the court in the subdivisions of this memorandum, each discussing the law applicable to Plaintiffs' claims under sections 10b, 14(d), 14(e) of the Securities and Exchange Act of 1934, Rule 10(b)-5 adopted by the Securities and Exchange Commission, and common law claims of alleged breaches of fiduciary duties by defendants, the court concludes that plaintiffs' evidence, considered together with all reasonable inferences favorable to them, totally fails to prove necessary elements of their claims. The facts established by the proof, and the inferences reasonably drawn therefrom, point so strongly and overwhelmingly in favor of defendants that the court is convinced the jury in this case, as reasonable men and women, would not arrive at a verdict contrary to one in defendants' favor.

Therefore, defendants' motion for directed verdict should be granted, without submission of this case to jury, because this ruling will have the result of saving the mischance of speculation over plaintiffs' legally unfounded claims. Accordingly, the motion for directed verdict is granted and since an order granting a motion for directed verdict is effected without any assent of the jury, it will be discharged; and judgment will be entered on the directed verdict. The clerk will be instructed to enter a judgment in each of these consolidated cases against the plaintiffs and in favor of each defendant, with costs as provided by law.

FOOTNOTES

1. Ruth Panter, the original plaintiff in 78C 537, was dismissed from the suit during the pretrial phase of the case.

2. Where the citizenship of a plaintiff is not stated, it is because he or she is a citizen of Illinois.

3. Marshall Field & Company is only a nominal party. Plaintiffs have stated that they seek no judgment or relief against it since they are its shareholders, and thus owners of the corporation.

4. The death of John M. Budd, prior to this trial, has been suggested; but no attempt has been made by plaintiff to substitute his legal representative as a defendant in these proceedings. See Rule 25(a), Fed.R.Civ. P.

5. This summary of the conduct about which the complaint is made, and of the unlawful course of conduct alleged, is taken from the first amended complaint in Panter, 78 C 537 and the amended complaint for injunction and other relief in Weiss, 78 C 620 because, when examined, it can be seen that the allegations in the other complaints are either identical or substantially similar to those in these two cases.

6. *Duriso v. K-Mart No. 4195, Div. of S. S. Kresge Co.*, 559 F.2d 1274, 1277 (5th Cir. 1977); *Lescher Building Service, Inc. V. Local Union No. 133, etc.*, 310 F.2d 331 (7th Cir. 1962).

7. *Gehrhardt v. General Motors Corp.*, 581 F.2d 7(2d Cir. 1978); *Hackett v. Reynolds and Co.*, 577 F.2d 948 (5th Cir. 1978).

8. Hereafter in this Memorandum, Marshall Field & Company will be referred to as Marshall Field, Field, or company, as the context may require.

9. This was the testimony of Joseph Berke, the plaintiff and class representative in one of the related suits, 78 C 2480, and is found in Transcript p. 3510.

10. Hereafter in this Memorandum, Carter Hawley Hale will be referred to either as Carter, or by the acronym CHH, as the context may require.

11. The motion under Rule 41(b), Fed.R.Civ.P., will be treated by the court as a motion for directed verdict. *Johnson v. Chicago, Milwaukee, St. Paul & Pacific R. CO.*, 400 F.2d 968 (9th Cir. 1968).

12. The court will not extend this memorandum to discuss the response, under applicable laws, which defendants as Marshall Field directors were obliged to give the letter written by Philip M. Hawley for CHH. In this court's judgment, that letter, in the context of the circumstances under which it was written and received, was an imposition on Marshall Field, its directors, and executives. The law vested defendants with discretion to decide the answer they were to give it, and the action they should have taken concerning it. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 722 (Del. Supr. 1971); Kaplan v. Goldsamt, 380 A.2d 556 (Del. Ch. 1977). There is nothing in the legislative history of the Williams Act to suggest that Congress intended those amendments to modify the traditional powers of American corporate directors. See Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 25-37, 97 S.Ct. 926, 941-947, 51 L.Ed.2d 124 (1977).

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 80-1375, 80-1389

RUTH PANTER, et al.,

Plaintiffs-Appellants,

v.

MARSHALL FIELD & CO., et al.,

Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.
No. 78 C 537 - George N. Leighton,
Judge.

ARGUED SEPTEMBER 10, 1980 -
DECIDED APRIL 2, 1981

Before PELL and CUDAHY, Circuit Judges, and DUMBAULD, Senior District Judge.*

PELL, Circuit Judge. The nineteen named plaintiffs in these consolidated cases appeal from a judgment of the district court which granted the defendants' motion for a directed verdict at the close of the plaintiffs' presentation of evidence to the jury. Panter v. Marshall Field & Co., 486 F. Supp. 1168 (N.D. Ill. 1980). The plaintiffs, shareholders of Marshall Field & Company (Field's) sought to prove that the defendants, the company and its directors, had wrongfully deprived the plaintiffs of an opportunity to dispose of their shares at a substantial premium over market when the defendants successfully fended off a takeover attempt by Carter Hawley Hale (CHH), a national retail chain. The plaintiffs claimed relief under federal securities law and state corporation and tort law. The district court found the evidence insufficient to go to the jury on the federal law claims and, exercising its pendent jurisdiction, similarly found the evidence insufficient on the state law claims.

I. STATEMENT OF THE CASE

A thorough and accurate summary of the facts was presented in the opinion of the district court. However, because the posture of the case requires determination of whether the facts established by the plaintiffs provide a sufficient basis for a jury verdict, we review them in some detail here.

A. The Parties.

The named plaintiffs in the cases consolidated for trial were nineteen shareholders of Field's. On June 30, 1978, the plaintiffs were certified as class representatives of all persons who held Field's common stock at any time between December 12, 1977, and February 22, 1978. The plaintiff class was subdivided into four subclasses. Subclass I included all persons who held Field's stock on or before December 12, 1977, but disposed of it before February 22, 1978. Subclass II included all persons who acquired Field's stock after December 12, 1977, and disposed of it before February 22, 1978. Subclass III included all persons who acquired Field's stock after December 12, 1977, and did not dispose of it before February 22, 1978. Subclass IV included all persons who held Field's stock on or before December 12, 1977, and did not dispose of it before February 22, 1978.

Field's is a Delaware corporation with its principal office in Chicago, Illinois. The company has been engaged in the operation of retail department stores since 1852, and on December 12, 1977, it was the eighth largest department store chain in the United States, with thirty-one stores. Fifteen of the stores were located in the Chicago area: they included the State Street and Water Tower Place Stores in Chicago, the Oakbrook Store in west suburban Chicago, and the Old Orchard and Hawthorn Center Stores in north suburban Chicago. Other divisions included the Frederick & Nelson division in the state of Washington; the Halle Division of Halle Brothers Company in Ohio and Pennsylvania; and the Crescent Division of Halle with stores in Spokane, Washington.

The ten directors of Marshall Field & Company during the period from December 12, 1977 to February 22, 1978 are also named as defendants. Seven of the directors were not affiliated with Field's management; the remaining three were officers of Field's.

CHH is a California corporation engaged in the operation of retail department, specialty, and book stores. It was not a party here, although its efforts to acquire Field's gave rise to this litigation. CHH's Neiman-Marcus division operates retail stores in Texas and the Southeastern United States. As of December 12, 1977, it had one store in Northbrook Court in north suburban Chicago. CHH also had acquired land on North Michigan

Avenue, one block south of Field's Water Tower Place Store, and had expressed its intent to put a Neiman-Marcus Store there, although those plans were in abeyance during the relevant time period. CHH had also been attempting for some time to enter the Oakbrook Shopping Center in west suburban Chicago where Field's already had a store. Other divisions of CHH had department or specialty stores in the western United States. Its Walden Book division operated 433 book stores across the United States. In December 1977 Walden was the third or fourth largest bookseller in the Chicago market.

B. The Pre-1977 Events.

On several occasions in the late 1960's and continuing to the mid-1970's, Field's management was approached by would-be merger or takeover suitors. In 1969 Field's sought the help of Joseph H. Flom, an attorney with expertise in such matters, in determining how best to respond to the overtures of interested parties. Flom advised the board that the interest of the shareholders was the paramount concern, and that management should listen to such proposals, evaluate whether the proposal was serious, and whether the proposal raised questions of antitrust violations. He also advised Field's directors and management to invest the company's reserves and use its borrowing power to acquire other stores, if such acquisitions were in accord with the sound business judgment of the board, and in the best interest of the company and its shareholders. He counseled that such acquisitions were a legal way of coping with unfriendly takeover attempts.

Flom's advice was followed during this period in conjunction with a series of tenative approaches to Field's by or on behalf of potential acquirors. Thus, when in 1969 a third party interested in acting as a "catalyst" for a Field's-Associated Dry Goods merger approached the board, it considered the matter and rejected further exploration. While this offer was under consideration, Field's acquired Halle Brothers, a retailer with stores in communities in which Associated already had stores.

In 1975, investment bankers representing Federated Department Stores, then the nation's largest department store chain, approached Field's about a possible merger. Again, the Field's board considered the matter, but in light of advice of counsel that it would raise antitrust problems and damage the chances of a proposed Field's acquisition of the Wanamaker Company, the board determined not to pursue the contract.

Two approaches were initiated in 1976. In August, Dayton-Hudson, a large national department store, expressed interest in a possible merger. Field's management drew up a thorough list of options covering the advantages and disadvantages of such a merger. After reviewing that statement, Field's board decided that in light of their plans for future development and financial projections for 1977, a merger would not be advisable.

In September of 1976 Field's management received an inquiry from a third party asking whether Field's was interested in having Gamble-Skogmo, another national retailer, acquire a twenty percent block of Field's stock to "prevent a takeover by another party". Again the proposal was evaluated by Field's directors and turned down.

C. The CHH Approach.

In 1977 the Field's board decided to hire Angelo Arena, then head of CHH's Neiman-Marcus division, to commence employment with the company in 1977, work with its current present, Joseph Burnham, for two or three years, and then assume the presidency of Field's on Burnham's retirement. However, when Burnham died unexpectedly in

October of 1977, the Field's board determined, in an emergency meeting held three days after Burnham's death, to elect Arena to the presidency immediately and ask him to come to Chicago earlier than originally planned. In the three day interval CHH made informal contacts with intermediaries and expressed an interest in merging with Field's. The board was informed of those contacts at the October 13 meeting and resolved at that time not to consider the merger.

CHH continued to press its attentions however, and on November 16, Arena asked Field's antitrust counsel, the Chicago law firm of Kirkland & Ellis, to investigate the antitrust aspects of such a merger. Field's board met the next day, and authorized Arena and George Rinder, another director and Field's executive, to meet with representatives of CHH. That meeting took place the next day. The CHH team expressed their reasons why a merger would be good for both companies, and noted that a foreign firm was likely to make a $60.00 tender offer for Field's at any time. Field's representatives conveyed the board's position that internal expansion would be best for Field's and expressed concern about antitrust problems of such a merger. CHH responded that their counsel had opined that there was no antitrust deterrent to the merger. Field's representatives agreed to report the discussions to the Field's board.

On December 2, Hammond Chaffetz

of the Kirkland firm advised Field's management that in the opinion of Kirland & Ellis the proposed combination would be illegal under the antitrust laws in light of (a) the existing competition between Field's stores and the Northbrook Neiman-Marcus Store; (b) the potential competition between Field's Chicago stores and the Chicago stores Neiman-Marcus was planning to open; and (c) the existing competition between Field's stores (second in book sales in Chicago) and the stores operated by CHH's Walden division. Chaffetz' opinion was conveyed to Field's directors.

On December 10, Philip Hawley, the president and chief executive officer of CHH, called Arena and told him that unless Field's directors agreed to begin merger negotiations by the following Monday, December 12, he would make a public exchange proposal. He told Arena that CHH would propose beginning negotiations with an offer that for each share of Field's common stock CHH would exchange a number of its shares roughly equivalent to $36.00. Arena refused to enter such negotiations. Field's shares were trading on the market at around $22.00 per share on the Friday before Hawley delivered his ultimatum.

Arena construed Hawley's call as the beginning of an unfriendly takeover attempt by CHH. He contacted Flom, and arranged a meeting of key Field's directors, counsel, and investment bankers for the next day. At the meeting Arena reported the Kirkland & Ellis opinion. It was agreed to poll the absent directors for authorization to file a suit seeking resolution of the antitrust issues posed by the merger proposal. The group also determined to inform the New York Stock Exchange, and to call an emergency meeting of the Field's board for December 13.

On Monday, December 12, 1977, the CHH letter was received. Arena contacted all Field's directors but one by telephone, and they authorized the filing of the antitrust suit.

The special meeting of the board took place the next day with all members present. Also at the meeting were Field's attorneys and investment bankers. The lawyers, particularly Chaffetz, opined on the lack of legality of the merger, and the investment bankers evaluated the financial aspects of the merger. Field's management then made a report and projected that the company's future performance would be generally favorable. Many of the directors agreed with the investment bankers that a share of common stock would bring more than $36.00 in a sale of control of the company. After consideration of the above factors the directors voted unanimously to reject the proposal because in their judgment the merger as proposed would be "illegal", inadequate, and not in the best interests of Marshall Field & Company, its stockholders and the communities which it serves."

The directors also authorized issuance of a press release conveying their decision. On December 14, Field's issued the press release, which indicated that Field's directors and management had faith in the momentum of the company, and that "it would be in the best interests of our stockholders, customers and employees for us to take advantage of this momentum and continue to implement our growth plans as an independent company." Field's shares traded in the market in a range of $28.00 to $32.00 that day, and continued in approximately that range until January 31, 1978.

On December 20, 1977, Arena addressed a letter to Field's stockholders in which he spoke optimistically of the future and reviewed Field's immediate past performance. He pointed out that Field's had disposed of unprofitable ventures, and that "for the nine months ended October 31, income before ventures and taxes was up 24.4% and consolidated net income was up 13%." He referred to the CHH proposal for negotiation and to the advice of antitrust counsel "that a CHH-Marshall Field & Company merger would clearly violate the United States antitrust laws," and concluded that "(y)our Board of Directors believes the maximum benefits for Marshall Field & Company and its stockholders, employees, customers and the communities it serves will result from continuing to develop as an independent, publicly-owned Company."

On January 5, 1978, Field's issued another press release, announcing that it had amended its antitrust suit against CHH to include allegations of federal securities law violations. The release reiterated Field's confidence in its future, and stated "our management is continuing the implementation of our longstanding programs to further build and develop the business of Marshall Field & Company."

On January 19, 1978, Field's directors had their regular meeting. Two expansion proposals were on the agenda: one that the company expand into the Galleria, a Houston shopping mall where a planned Bonwit Teller store had failed to materialize, creating an attractive opening; the other that the company acquire a group of five Liberty House stores in the Pacific Northwest. The Galleria already contained a CHH Neiman-Marcus store. The board resolved to pursue both expansion programs. Field's executives and directors had long considered expansion into these two areas, and the company's interest in such expansion was well known to investment analysts in the department store field.

On February 1, CHH announced its intention to make an exchange offer of $42.00 in a combination of cash and CHH stock for each share of Field's stock tendered. The offer was conditioned on the fulfillment or non-occurrence of some twenty conditions. Appropriate documents for announcement of a tender offer were filed with the SEC. The market price of Field's stock rose to $34.00 per share, and stayed in the $30.00 to $34.00 range until February 22, 1978.

A special meeting of the Field's board was convened the next day to consider the new offer. The legal implications of the CHH filing were explained to the board by counsel, and Chaffetz brought the group up to date on the antitrust suit. There was no discussion of the adequacy of the offer in light of the board's determination that the proposed combination would clearly be illegal. The board also determined to go ahead with the Galleria plan, and approved the signing of a letter of agreement to enter the mall.

After the meeting Field's issued another press release reaffirming its opposition to the proposed merger. It concluded with a statement by Arena that "I assumed my position with Marshall Field & Company with the understanding that I would devote myself to making Marshall Field & Company a truly national retail business organization. We ... are determined not to be deterred from this course. Our recently announced agreement to acquire five Liberty House Stores in Tacoma, Washington and Portland, Oregon was one step in our program."

On February 8, another Field's press release announced that Field's had concluded negotiations for a department store to be opened in the Galleria. On February 22, CHH announced that it was withdrawing its proposed tender offer before it became effective, because "the expansion program announced by Marshall Field since February 1st has created sufficient doubt about Marshall Field's earning potential to make the offer no longer in the best interests of Carter Hawley Hale's shareholders." None of the events that conditioned CHH's tender offer had occurred since February 1. Following the announcement, the market price of Field's shares dropped to $19.00, lower than it had been on December 9, the last trading day prior to CHH's first proposed offer.

II. THE STANDARD OF REVIEW

(1) We note as a preliminary matter that is well settled that if the result below is correct it must be

affirmed, although the lower court relied on a wrong ground or gave a wrong reason. SEC v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 157, 82 L.Ed. 224 (1937); Barrett v. Baylor, 457 F.2d 119, 122 (7th Cir. 1972).

A. All the Evidence Should be Considered on a Motion for Directed Verdict.

(2) In reviewing a district court's grant of a motion for directed verdict, the standard to be applied by the court of appeals is the same as that applied by the trial court. 5A Moore's Federal Practice 50.07(2) at 50-82 to -83 (2d ed. 1977); see C-Suzanne Beauty Salon, Ltd. v. General Insurance Co., 574 F.2d 106, 112 n.10 (2d Cir. 1978). That standard, which

has long been settled in this circuit, was most recently enunciated in Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427

> (7th Cir. 1980): (I)t is our task to determine whether there is substantial evidence to support (appellant's) claim and upon which evidence a jury could properly have found in favor of (appellant)...This standard ...requires this Court to review all of the evidence in the light most favorable to (the appellant).

Id. at 430 (Emphasis added. Citations omitted.); accord, Hannigan v. Sears, Roebuck & Co., 410 F.2d 285, 288 (7th Cir.), cert. denied, 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178 (1969). Both the Chillocothe and Hannigan expressions of the rule reflect the requirement that the evidence, taken as a whole, provide a sufficient probative basis upon which a jury could reasonably reach a verdict, without "speculation over legally unfounded claims." Brady v. Southern

Railway, 320 U.S. 476, 480, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943).

Thus, in Hohmann v. Packard Instrument Co., 471 F.2d 815 (7th Cir. 1973), this court upheld the grant of a directed verdict in a suit brought under SEC Rule 10B-5, 17 C.F.R. §240.10b-5(1980), finding that the defendant's failure to disclose its purpose to abandon the product accounting for two-thirds of its sales pursuant to a long-planned but undisclosed model changeover was not misleading, and that the plaintiffs had failed to provide a foundation of fact sufficient to sustain their burden of proof. In a thoughtful opinion, Judge Hastings reviewed the standards for ruling on a motion for directed verdict, and concluded that the role of the appellate court in the directed verdict determination is "to evaluate the evidence to determine whether it is of sufficient probative value that members of the jury might fairly and impartially differ as to the inferences to be reasonably drawn therefrom. Id. at 820.

Although we view, in the present situation, the evidence in the most favorable light to appellants, on the other hand it is not the rule in this circuit that only testimony elicited on direct examination may be considered in a motion for directed verdict. As the Hannigan and Chillicothe courts ackonwledged, the court must consider, ever mindful that it must do so in the light most favorable to the non-moving party, all the evidence in determining whether there is enough to create a jury question. As we pointed out in Brunner v.

Minneapolis, St. Paul and Sault Ste. Marie Railroad, 240 F.2d 608 (7th Cir. 1957), "(u)nder well established rules, plaintiff is entitled to have the credible evidence considered in the light most favorable to her. *However, this does not mean that we may ignore uncontradicted, unimpeached evidence supporting defendants' position*." *Id*. at 609 (emphasis added).

B. The Grant of a Directed Verdict May Be Appropriate in a Trial Where Motive and Good Faith Have Been Placed in Issue.

(3) The plaintiffs also contend that because the question of the directors' motives and good faith has been placed in issue, resolution by directed verdict is inappropriate. They rely on language in two cases,

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944) (issue as to amount of damages), and Staren v. American National Bank and Trust Co., 529 F.2d 1257 (7th Cir. 1976) (issue as to whether individuals purchased securities for their own account or as agents), in which a trial court's grant of summary judgment was overturned. These cases are inapt for two reasons. First, the motiion for summary judgment under Fed. R.Civ. P. 56 requires that there be "no genuine issue as to any material fact." Thus, to survive summary judgment a party need only raise an issue of fact, whereas the test on directed verdict is whether a party has presented sufficient evidence to support a finding in his favor in that contested issue. The directed verdict situation thus presents a higher evidentiary hurdle than the preliminary test of the summary judgment. Second, even under the Sator standard, "(t)hat state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts." Washinton Post Co. v. Keogh, 365 F.2d 965, 967-68 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011, 97 S.Ct. 708, 17 L.Ed.2d 548 (1967) (footnote omitted).

(4) In this case the plaintiffs have placed in issue whether the defendants violated the antifraud prohibitions of the federal securities laws. The requisite mental state for such violations is at least recklessness, as the plaintiffs recognize in their

brief, citing Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir.), cert. denied, 434 U.S. 875, 98 S.Ct. 224, 225, 54 L.Ed.2d 155 (1977). As the Keogh court correctly pointed out, that mental state must be inferred from objective facts. The question whether there are sufficient objective facts on which the jury can base a reasonable inference is the essence of any directed verdict determination by the trial court, Hohmann v. Packard Instrument Corp. 471 F.2d at 819, and a directed verdict is thus no less appropriate in this case than in any other.

III. THE FEDERAL SECURITIES LAW CLAIMS.

The plaintiffs allege violations of two broad antifraud provisions of the Securities Exchange Act of 1934.

First, they claim the defendants violated §14(e) of the Williams Act, 15 U.S.C.§78n(e) (1976), which prohibits deception "in connection with any tender offer," and second, they claim the defendants breached SEC Rule 10b-5, 17 C.F.R. §240.10b-5 (1980) which similarly prohibits deceptive statements or conduct, "in connection with the purchase or sale of any security." The two provisions are coextensive in their antifraud prohibitions, and differ only in their "in connection with" language. They are therefore construed in pari materia by courts. Golub v. PPD Corp, 576 F.2d 759, 764 (8th Cir. 1978): Gulf & Western Industries, Inc. v. Great A & P Tea Co., 476 F.2d 687, 696 (2d Cir. 1973); Altman v. Knight, 431 F.Supp. 309 (S.D.N.Y. 1977).

Both provisions are manifestations of the "philosophy of full disclosure" embodied in the Securities Exchange Act of 1935. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977). However, because the "in connection with any tender offer" language of the Williams Act provision presents special concerns not present in analysis under Rule 10b-5, we address these claims separately.[1]

A. The Williams Act Claims.

Section 14(e) of the Williams Act is a broad antifraud provision modeled after SEC Rule 10b-5, and is designed to insure that shareholders confronted with a tender offer have adequate and accurate information on which to base the decision whether or not to

tender their shares.[2] Piper v. Chris-Craft Industries, Inc., 430 U.S.1, 35, 97 S.Ct. 926, 946, 51 L.Ed.2d 124 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975); Lewis v. McGraw, 619 F.2d 192 (2d Cir.), cert. denied, _ U.S._, 101 S.Ct. 354, 66 L.Ed.2d 214 (1980); see S.Rep.No.550, 90th Cong., 1st Sess. 3 (1967); H.R. Rep.No. 1711, 90th Cong., 2d Sess. 3 (1968), reprinted in (1968) U.S. Code Cong. & Ad.News 2811, 2813.

Upon the announcement of a tender offer proposal a target company shareholder is presented with three options: he may retain his shares; he may tender them to the tender offeror if the offer becomes effective; or he may dispose of them in the securities market for his shares, which generally rises on the announcement of a tender offer. The plaintiffs have alleged that the defendants violated §14(e) both by depriving them of their opportunity to tender their shares to CHH, the tender offeror, and by deceiving them as to the attractiveness of disposing of their shares in the rising market.

1. The Lost Tender Offer Opportunity.

By denying the plaintiffs the opportunity to tender their shares to CHH, the plaintiffs claim the defendants deprived them of the difference between $42.00, the amount of the CHH offer, and $19.76, the amount at which Field's shares traded in the market after withdrawal of the CHH proposal. Total damages under this theory would exceed $200,000,000.00.

Because §14(e) is intended to protect shareholders from making a tender offer decision on inaccurate or inadequate information, among the elements of §14(e) plaintiff must establish is "that there was a misrepresentation upon which the target corporation shareholders relied.." Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 373 (2d Cir.), cert. denied. 414 U.S. 910, 94 S.Ct. 231, 38 L.Ed.2d 148 (1973). Because the CHH tender offer was withdrawn before the plaintiffs had the opportunity to decide whether or not to tender their shares, it was impossible for the plaintiffs to rely on any alleged deception in making the decision to tender or not. Because the plaintiffs were never presented with that critical decision and therefore never relied on the

2. Section 14(e) provides:
defendants' alleged misrepresentations, they fail to establish a vital element of a §14(e) claim as regards the CHH $42.00 offer.

In the recent case of Lewis v. McGraw, 619 F.2d 192 (2d Cir.), cert. denied, _U.S._, 101 S.Ct. 354, 66 L.Ed.2d 214 (1980), the Second Circuit similarly held that when a proposed tender offer fails to become effective, shareholders of the target company cannot state a cause of action for alleged misstatements under §14(e) because of the absence of this crucial element of reliance. Id at 195-96.

It is difficult indeed to imagine a case more directly to the point here than the Lewis decision. In that case the American Express

Company proposed a "friendly business combination" with McGraw-Hill. McGraw-Hill's directors rejected the offer in a public letter as reckless, illegal, and improper. American Express then filed a proposed tender offer with the SEC, revealing its intention to make a second offer to the McGraw-Hill stock. The offer would not become effective unless McGraw-Hill agreed not to oppose it. McGraw-Hill's directors rejected the second offer, however, which therefore expired before becoming effective. McGraw-Hill shareholders sued for damages under §14(e) of the Williams Act. In affirming the district court's dismissal for failure to state a cause of action, the court noted that "(i)n the instant case, the target shareholders simply could not have relied upon McGraw-Hill's statements whether true or false, since they were never given an opportunity to tender their shares." Id. at 195. The plaintiffs here seek to distinguish Lewis on its "unique facts." The two cases, however, are the same in all material aspects: both involve shareholders' allegations that incumbent management and directors prevented the plaintiffs from accepting a tender offer by issuing false and misleading statements or by breaching the fiduciary duties owed to the shareholders. In both cases the requisite element of reliance is absent.

The plaintiffs seek to establish that reliance is presumed from materiality in a case involving primarily a failure to disclose, relying on a line of cases culminating in

Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 1472, 31 L.Ed.2d 741 (1972). As the court pointed out, however, in Lewis, neither Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), nor Affiliated Ute abolished the reliance requirement, but "(r)ather...held that in cases in which reliance is possible, and even likely, but is unduly burdensome to prove, the resulting doubt would be resolved in favor of the class the statute was designed to protect." Lewis at 195; cf. Titan Group, Inc., v. Faggen, 513 F.2d 234, 238-39 (2d Cir.), cert. denied, 423 U.S. 840, 96 S.Ct. 70, 46 L.Ed.2d 59 (1975) (reliance element in 10b-5 suit not eliminated by Ute).

The Mills-Ute presumption is

essentially a rule of judicial economy and convenience, designed to avoid the impracticality of requiring that each plaintiff shareholder testify concerning the reliance element. Auto-Lite, 396 U.S. at 385, 90 S.Ct. at 622; see Chris-Craft Industries, Inc. v. Piper Air-Craft Corp., 480 F.2d, 341, 375 (2d Cir.), cert. denied, 414 U.S. 910, 94 S.Ct. 231, 38 L.Ed.2d 148 (1973) ("These impracticalities are avoided by establishing a presumption of reliance where it is logical to presume that such reliance in fact existed..."); Kohn v. American Metal Climax, Inc., 458 F.2d 255, 290 (3rd Cir.), cert. denied, 409 U.S. 874, 93 S.Ct. 120, 340 L.Ed.2d 126 (1972) (Adams, J. concurring in part, dissenting in part) (10b-5 action).

However, when the logical basis on which the presumption rests is absent, it would be highly inappropriate to apply the Mills-Ute presumption. "(W)here no reliance (is) possible under any imaginable set of facts, such a presumption would be illogical in the extreme." Lewis at 195.

The plaintiffs here pose two additional arguments to application of the Lewis holding; first that it allows a target company management to profit by their own wrong if they are successful in driving off a tender offeror with misrepresentations or omissions otherwise violative of the Act, and second, that unless the pre-effective period is covered by the Act, violative statements could be made with impunity and later affect any future decision shareholders make after the offer becomes effective.

The claim that the defendants are allowed to profit by their own wrong is irrelevant to this case. Such an argument would require proof of a casual link between the defendants' wrongful acts or omissions and the withdrawal of the tender offer. Here there is uncontroverted evidence that it was Field's recent acquisitions and plans for expansion that caused the withdrawal of the CHH tender offer. The decision to make acquisitions is one governed by the state law of directors fiduciary duty. Altman v. Knight, 431 F.Supp. 309 (S.D.N.Y. 1977). Therefore even if such conduct were a breach of the defendant directors' fiduciary duty, the plaintiffs would be relegated to their remedy at state law. See Section 10(b) and Rule 10b-5 Claims, infra. This argument, therefore, cannot create a federal securities law claim when the alleged "wrong" the defendant committed is barred from federal scrutiny by the rule of Santa Fe Industries, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977); see Lewis at 195.[3]

The plaintiffs' second argument that statements made in the pre-effective period might have repercussions after the offer becomes effective, see Applied Digital Data Systems, Inc. v. Milgo Electronic Corp., 425 F.Supp. 1145, 1154 (S.D.N.Y. 1977), is plainly inapt in the situation we address, where by hypothesis that future offer never materializes.

In sum, we find the reasoning

of Lewis persuasive, if not compelling, and therefore affirm the district court's grant of the defendants' motion for directed verdict on the §14(e) claims as to the lost tender offer opportunity.

2. The Plaintiffs' Decision Not to Sell in the Market.

The plaintiffs also contend that defendants' misrepresentations or omissions of material fact caused the plaintiffs not to dispose of their shares in the market, which was rising on the news of CHH's takeover attempt. Because we hold that a damages remedy for investors who determine not to sell in the marketplace when no tender offer ever takes place was not intended to be covered by §14(e) of the statute, we are not swayed by the surface appeal of this argument.

The Supreme Court teaches that the starting point in ascertaining Congressional intent is always the language of the statute itself. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 856, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J.) (concurring opinion). Section 14(e) is applicable by its terms to conduct "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation." 15 U.S.C. §78n(e) (1976) (emphasis added). The language is not unambiguous, but it does seem to contemplate the existence of an effective offer capable of acceptance by the shareholders. The legislative history of the Act is replete with indications that Congress intended to protect an investor faced with the pressures generated by the exigencies of the tender offer context, and that the sole purpose of §14(e) is protection of the investor faced with the decision to tender or retain his shares: "In the rather common situation where existing management or third parties contest a tender offer, shareholders may be exposed to a bewildering variety of conflicting appeals and arguments designed to persuade them either to accept or reject the tender offer." 113 Cong. Rec. 855-56 (1967) (remarks of Senator Williams). See Hearings on S.510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 33 (1967) (statement of Manuel F. Cohen, Chairman, SEC) O"To)he bill is designed first, to provide those who receive a tender offer with information adequate to an informed decision whether or not to accept..."); Id. at 203, 205 (bill's purpose is "to assure that public shareholders will be given information adequate for an informed decision when a tender offer is made for the shares of their company"; disclosure needed so shareholder can "make an intelligent decision whether or not to tender his shares").

Courts seeking to construe the provisions of the Wiliams Act have also noted that its protections are required by the peculiar nature of a tender offer, which forces a shareholder to decide whether to dispose of his shares at some premium over the market, or retain them with knowledge that the offeror may alter the management of the target company to its detriment. See Piper v. Chris-Craft Industries, Inc., 430 U.S. at 35, 97 S.Ct. at 946; Bucher v. Shumway, 452 F.Supp. 1288, 1294 (S.D.N.Y. 1978).

In another context, courts seeking to determine whether unconventional means of acquisition of controlling blocks of shares constitute a "tender offer" within the meaning of the Williams Act (which leaves the term undefined) have determined that the distinguishing characteristic of the activity the Williams Act seeks to regulate is the exertion of pressure on the shareholders to make a hasty, ill-considered decision to sell their shares. See, e.g., Wellman v. Dickinson, 475 F.Supp. 783 (S.D.N.Y. 1979) (Intensive private solicitation plus premium plus strict time constraints on acceptance created tender offer); S-G Securities, Inc. v. Fuqua Investment Co., 466 F.Supp. 1114 (D. Mass. 1978) (widespread publicity campaign plus massive open market purchases created tender offer pressures). Here there was no deadline by which shareholders were forced to tender, and by hypothesis when we are discussing market transactions, no premium over the market. Therefore Field's shareholders were simply not subjected to the proscribed pressures the Williams Act was designed to alleviate. See Kennecott Copper Corp. v. Curtiss-Wright Corp., 584, F.2d 1195, 1207 (2d Cir. 1978) (solicitations to sell on national exchange where shareholders were offered no premimum over the market and given no deadline by which to make their decision created "no pressure... on sellers other than the normal pressure of the marketplace", although the purchaser sought to obtain and exercise control of the company).

(8) As we noted only last year in O'Brien v. Continental Illinois National Bank & Trust Co., 593 F.2d 54, 62-63 (7th Cir. 1979), the Supreme Court has continually limited the federal remedy in private federal securities actions. It has continued to decline the opportunity to enlarge that jurisdiction most recently by denying certiorari in the cases of Lewis v. McGraw, supra, and Bucher v. Shumway, [1979-80 Transfer Binder] Fed. Sec. L.Rep. (CCH) 97, 142 (S.D.N.Y. L979), aff'd, 622 F.2d 572 (2d Cir.) cert. denied, _U.S._, 101 S.Ct. 120, 66 L.Ed.2d 48 (1980). In light of this trend to avoid unduly expansive interpretations of the securities laws, and our finding that §14(e) was not intended to remedy the conduct complained of here, we hold

that §14(e) of the Williams Act does not give a damages remedy for alleged misrepresentations or omissions of material fact when the proposed tender offer never becomes effective.

The brief filed by the SEC as amicus curiae contends that failure to afford investors a damages remedy under §14(e) in situations where a tender offer proposal is withdrawn before it becomes effective might lead to abuses. It poses the hypothetical situation "where a person announces a proposed tender offer that he never intends to make in order to dispose of securities of the subject company at artificially inflated prices..." We note that such conduct would fall within the ambit of the prohibitions of Rule 10b-5, see infra, Cf. Zweig v. Hearst Corp., 594 F.2d 1261 (9th Cir. 1979) (financial columnist purchased stock knowing he would recommend it in his column and sell on the resulting rise; failure to disclose this scheme violated 10b-5).

The SEC also suggest that without such a remedy, persons could announce tender offers, again without intending to make them, to put pressure on management to consider merger proposals. Although the present case does not present such a situation, we believe that preliminary injunctive relief would be the appropriate remedy for such conduct. In Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937 (2d Cir. 1969) (Friendly, J.), the plaintiff, a target of a tender offer mounted by the defendant, sought preliminary injunctive relief under §14(e), claiming that the defendant had misrepresented its intentions concerning a potential tender offer. The district court denied preliminary relief, but after a trial on the merits found for the plaintiffs. The Second Circuit reversed, finding no misrepresentation by the offeror. In reaching that result, however, it noted:

> We agree with plaintiffs to the extent of believing that the application for a preliminary injunction is the time when relief can best be given...(W)e think that in administering §14(d) and (e)... if a violation has been sufficiently proved on an application for a temporary injunction, the opportunity for doing equity is ...considerably better then than it will be later on.

Id. at 947, quoted with approval in Piper v. Chris-Craft Industries, 430 U.S. 1, 42, 97 S.Ct. 926, 949, 66 L.Ed.2d 214 (1977) (defeated tender offeror does not have damages remedy under §14(e)). The rule urged by the SEC would only serve to intensify the pressure such spurious offers would exert on incumbent management, by confronting them with the spectre of shareholder damage suits which could result from the withdrawal of even a sham tender offer.

B. Section 10(b) and Rule 10b-5 Claims.

The plaintiffs have also alleged and sought to prove that the defendants violated §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) (1976), and SEC Rule 10b-5, 17 C.F.R. §240.10b-5 (1980), promulgated to implement that statute. Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

The gravamen of the plaintiffs' 10b-5 claim is that Field's directors acted pursuant to a long-standing undisclosed policy of independence and resistance to all takeover attempts designed to perpetuate the defendant directors' control of the corporation. The plaintiffs assert that the defendants' failure to disclose this policy was an omission of a material fact which made other statements and conduct of the defendants misleading. They also claim that the policy motivated the defendant directors to make other misrepresentations or omissions of material facts in relation to Fields prospects and plans.

As the Supreme Court noted in Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477-78, 97 S.Ct. 1292, 1302-03, 51 L.Ed.2d 480 (1977), the rule is a manifestation of the "philosophy of full disclosure," embodied in the Securiteis Exchange Act of 1934; it therefore requires proof of the element of deception, and does not provide a remedy for the breach of fiduciary duty a director owes his corporation and his shareholders under state law. See In re Sunshine Mining Securities Litigation, (1979_80 Transfer Binder) Fed.Sec.L.Rep. (CCH) 97, 217 at 96,635 (S.D.N.Y. 1979) (An interpretation of 10b-5 "which would include instances of corporate mismanagement where shareholders were treated unfairly by a fiduciary, however, would be wholly inconsistent with the Congressional intent.").

In the wake of Santa Fe, courts have consistently held that since a shareholder cannot recover under 10b-5 for a breach of fiduciary duty, neither can he "bootstrap" such a claim into a federal securities action by alleging that the disclosure philosophy of the statute obligates defendants to reveal either the culpability of their activities, or their impure motives for entering the allegedly improper transaction. See, e.g., Bucher v. Shumway, (1979-80 Transfer Binder) Fed.Sec.L.Rep. (CCH) 97, 142 at 96,300 (S.D.N.Y. 1979) aff'd, 622 F.2d 572 (2d

Cir.), cert. denied - U.S. - 101 S.Ct. 120, 66 L.Ed.2d 48 (1980) ("The securities laws while their central insistence is upon disclosure were never intended to attempt any any such measures of psychoanalysis or preported (sic) self-analysis.").

1. The Policy of Independence.

The plaintiffs allege that the defendants, motivated by a desire to perpetuate their own control over Field's adopted "a policy of resisting all offers to acquire Marshall Field & Company", regardless of the potential benefits such offers might bring to the shareholders of the company.

Even assuming that the plaintiffs were able to establish the existence of such a policy, neither the policy nor a failure to disclose its existence can give rise to a federal securities law cause of action absent the element of manipulation[4] or deception required by Rule 10b-5. Santa Fe Industries supra; Bucher, supra; In re Sunshine Mining, supra.

The critical issue in determining whether conducts meets the requirement of deception, the court announced in Santa Fe Industries, is whether the conduct complained of includes the omission or misrepresentation of a material fact, or whether it merely states a claim for a breach of a state law duty. A board of directors' decision to oppose or welcome a takeover attempt involves the exercise of directorial judgment inherent in their role in corporate governance. Treadway Cos. v. Care Corp., 638 F.2d 357 at 381 (2d Cir. 1980); see Northwest

Industries, Inc. v. B.F. Goodrich Co., 301 F.Supp. 706, 712 (N.D. Ill. 1969) ("(M)anagement has the responsibility to oppose offers which, in its best judgment, are detrimental to the company or its stockholders.").

Thus in Bucher v. Shumway, (1979-80 Transfer Binder) Fed.Sec. L.Rep. (CCH) 97,142 (S.D.N.Y. 1979), aff'd, 622 F.2d 572, cert. denied, - U.S.-, 101 S.Ct. 120, 66 L.Ed.2d 48 (1980), the plaintiff shareholders charged that the defendants, directors of their company, had rejected a favorable tender offer proposal without fairly considering it and had instead sought to entrench themselves in control of the corporation by supporting a "friendly" tender offer at an unfair price. The court dismissed the shareholders' claims stating, "(T)he bare allegation does not state a cause of action under the securities laws...It is essentially an allegation that (the directors) breached fiduciary duties owed to plaintiffs and then failed to disclose these alleged breaches." Id. at 96-303.

Similarly in Sunshine Mining, supra, the plaintiffs claimed that incumbent management, motivated solely by the selfish interest to retain control and in complete disregard of their fiduciary obligation to shareholders, withheld support from a lucrative tender offer opportunity. The court held that since the plaintiffs' claim that approval of the offer was withheld by management for purely selfish reasons amounted to no more than a claim that Sunshine management acted unfairly and in breach of its fiduciary duties, the plaintiffs failed to state a cause of action under the federal securities laws. Id. at 96,635-36.

The plaintiffs' allegations that Field's directors rebuffed all acquisition attempts without regard to merit and failed to disclose the existence of an alleged policy so to act, are similarly insufficient to create a federal cause of action. Like the claim above, they simply state a claim for breach of the fiduciary duty directors owe shareholders under state corporate laws. This is precisely the type of claim the Supreme Court intended to bar from the federal forum when it announced the rule in Santa Fe Industries. It is therefore "entirely appropriate in this instance to relegate (plaintiffs)...to whatever remedy is created by state law, Santa Fe, 430 U.S. at 478, 97 S.Ct. at 1303, to the extent their claims are based on the existence of or failure to disclose any putative policy of independence.

2. Misrepresentations and Omissions of Material Fact.

The plaintiffs here, however, do not seek to recover solely on the basis of the existence of or failure to disclose a secret policy of independence. They also allege that pursuant to that policy the defendants issued a "stream" of deceptive or misleading statements, and engaged in conduct which acted as a deception. These allegations cluster around four factual occurrences: (a) CHH's $36.00 offer of December 12, 1977; (b) Field's filing of the antitrust suit against CHH on December 12, 1977;

(c) the acquisition Field's made and announced between December 12, 1977 and February 22, 1978; and (d) the use of earnings figures for the nine months ending in September, 1977 in communications to Field's shareholders.

In analyzing these claims, we keep in mind the post Santa Fe rule that if

> the central thrust of a claim or series of claims arises from acts of corporate mismanagement, the claims are not cognizable under federal law. To hold otherwise would be to eviscerate the obvious purpose of the Santa Fe decision, and to permit evasion of that decision by artful legal draftmanship.

Hundahl v. United Benefit Life Insurance Co., 465 F.Supp. 1346, 1365-66 (N.D. Tex. 1979); Altman v. Knight, 431 F. Supp. 309 (S.D.N.Y. 1977) (claim that directors made a wasteful defensive acquisition and falsely stated a legitimate business purpose, barred by Santa Fe). But cf. Royal Industries, Inc. v. Monogram Industries, Inc., (1976-77 Transfer Binder) Fed.Sec. L.Rep. (CCH) 95,863 (C.D. Cal. 1976) (defensive acquisition breached 10b-5; pre-Santa Fe case).

Furthermore, in order to prevail, the alleged misrepresentation or omission must be of a material fact. A material fact is one substantially likely to "have assumed actual significance in the deliberations of the reasonable shareholder." TSC Industries, Inc., v. Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976).

(a) CHH's $36.00 Offer of December 12, 1977.

The plaintiffs allege one

omission of material fact and two misrepresentations in relation to Field's response to the CHH letter of December 12, proposing a merger of the two companies at $36.00 per share. The plaintiffs assert that the defendants' press release of December 12, 1977, omitted a material fact when it failed to disclose that the $356.00 offer was merely the basis for negotiations. That the offer, however, was only a basis for negotiations was clearly indicated in CHH's press release announcing the $36.00 proposal. "(The) plaintiffs cannot complain merely because (Field's) did not re-emphasize facts that might have been helpful to (CHH) in its tender offer 'although such facts would have been known to the ordinary investor ...through papers

of general circulation.'"
Berman v. Gerber Products Co., 454 F.Supp. 1310, 1327 (W.D. Mich. 1978), quoting Gulf & Western Industries, Inc. v. Great A & P Tea Co., 356 F.Supp. 1066, 1071 (S.D.N.Y.), aff'd 476 F.2d 687 (2d Cir. 1973). We therefore hold that this omission fails to meet the standard of materiality set forth in TSC Industries, supra.

The plaintiffs also contend that although the Field's press release of December 14, 1977, called the $36.00 proposal inadequate, no one had ever analyzed the offer as inadequate, and that the defendants therefore misrepresented the attractiveness of the $36.00 offer. In light of the evidence that Field's investment bankers clearly indicated at the board meeting their belief (subsequently vindicated by the $42.00 offer) that a higher price could be obtained, and the board's knowledge of Carter's statement that a $60.00 offer might be forthcoming from a foreign company at any time, it was reasonable for the board to find that the $36.00 price was inadequate. We therefore hold that no reasonable juror could find Field's statements as to the adequacy of the $36.00 deceptive.

Finally the plaintiffs contend that in the December 20, 1977, press release, Field's misrepresented the nature of the consideration it had given the CHH proposal of December 12, when it stated that the board had rejected the offer only after "careful consideration". The plaintiffs first point to the board minutes of October 13, 1977, which reflect the board's decision that any merger with CHH "should not be considered." It is disingenuous of the plaintiffs to point to this statement, which reflects the board's reaction to preliminary informal contacts (one of which was made to the ninety-three year old father of one of the board members) made only days after the unexpected death of Burnham, Field's Chairman and Chief Executive Officer. Particularly in light of the uncontroverted evidence that on December 13, prior to the issuance of this press release, the Field's board met for several hours solely to consider the CHH approach, and to receive the analysis and advice of counsel, management and investment bankers to aid that consideration, no reasonable juror could find that field's management did not sufficiently carefully consider the CHH December 12, 1977 proposal. See Northwest Industries, Inc. v. B. F. Goodrich Co., 301 F.Supp. 706, 709 (N.D. Ill. 1969) (board consideration of multimillion dollar defensive acquisition during first hour of luncheon meeting sufficient to render its decision conclusive). Furthermore, even if the defendants did reject the proposal without the careful consideration the evidence unquestionably establishes that they did, this decision would be insulated from federal securities law scrutiny by the rule of Santa Fe Industries.

(b) Field's Filing of the Antitrust Suit.

The plaintiffs contend that the

defendants made four omissions of material fact in public statements about the antitrust suit filed against CHH on December 12, 1977. First, the plaintiffs cite three omissions in the Field's press release of December 12, 1977, which announced the filing of the suit; failure to disclose that Field's antitrust counsel was not present at the meeting when the defendants decided to file the suit; failure to mention CHH's offer to attempt to cure perceived antitrust violations and failure to mention Field's motive in filing the suit, which the plaintiffs allege was to further the secret policy of independence. Second, the plaintiffs contend that Field's press release of December 22, 1978, again omitted to disclose CHH's willingness to cure any perceived antitrust problems. In light of our finding that the decision to bring the antitrust action falls again, within the scope of directors' acts insulated from our scrutiny by the doctrine of Santa Fe Industries v. Green, supra, we pass over the materiality of these omissions, which is called into question by the opinion of field's experienced antitrust counsel that such curative attempts would be futile. As appellants concede in their brief to this court, "the antitrust issue is relevant to plaintiffs' case... only to the extent that...the initiation of antitrust litigation (was) an additional circumstance from which defendants' improper intent could be inferred." As we discussed above in the matter of the alleged policy of independence, the decision to resist a takeover is within the scope of directors' state law fiduciary duties, and there is no federal securities law duty to disclose one's motives in undertaking such resistance. In re Sunshine Mining, supra, at 96,635-36; Berman v. Gerber Products Co., 454 F.Supp. at 1318, 1323; Altman v Knight, 431 F. Supp. at 314. See Chemetron Corp v. Crane Co., 1977-2 Trade Cas. 61,717 (N.D.Ill. 1977). Therefore even assuming the antitrust suit was filed with the "impure" intent to preserve the directors' position at the expense of the shareholders' best interests, no federal securities claim can lie for failure to disclose that intent.

(c) The "Defensive" Acquisitions.

The plaintiffs also allege that Field's issued a series of misrepresentative or misleading statements in regard to the acquisitions Field's undertook in the months following the CHH approach. Of course, after Santa Fe, the decision to make acquisitions is shielded from federal scrutiny, as is inquiry into what motivated the acquisitions.

Specifically, the plaintiffs claim that in press releases of January 5, and February 8, 1978, the defendants announced that the acquisitions were taking place in accordance with their "longstanding programs" and expansion plans. The plaintiffs claim that the failure to disclose that such plans were historically undertaken only in response to perceived takeover threats made Field's announcements misleading. Once again, the plaintiffs have done no more than attempt to dress up a claim for breach of fiduciary duty by alleging a failure to disclose a motive to act contrary to shareholders' interests. Furthermore, there is no evidence upon which a reasonable jury could base a finding that Field's misrepresented its acquisition plans. There was substantial uncontroverted evidence, including testimony of the plaintiff's own expert witness, that Field's had prior intent to expand into the Pacific Northwest and Texas areas, and that such expansion was "natural" and "logical."

The plaintiffs also complain of the failure to disclose in the January 20, 1978, press release announcing the acquisition of the Liberty House stores that the defendants considered two of the five Liberty House stores to be "dogs." This claim is no more than an attempt to probe the business judgment of the directors, and cannot create a federal claim. Cf. Goldberger v. Baker, 442 F.Supp. 659, 664 (S.D.N.Y.1977) ("Even under the most narrow reading of Green, an allegation of deception must allege more than a mere failure to disclose the 'unfairness' of a transaction.").

The plaintiffs also claim that the defendants' press release announcing Field's plans to enter the Galleria in Houston, Texas, and to expand through the south, starting in Dallas, omitted material facts when it failed to disclose the presence of CHH Neiman-Marcus stores in the Galleria and in Dallas. Under the standard of materiality set out in TSC Industries, supra, and as interpreted in Berman and Gulf &

Western v. A. & P., supra, it is difficult to perceive how the omission of this information, which was readily available to anyone looking at CHH's annual report, or indeed to anyone at all familiar with the department store business, could be deceptive. In addition, the plaintiffs could never establish the requisite element of causation, for it was not the failure to disclose Neiman-Marcus' presence which caused the withdrawal of the offer, but rather Field's actual entry into the Galleria which caused the withdrawal of the offer. Altman v. Knight, 431 F.Supp. at 314.

(d) The Misleading Projections.

The plaintiffs also claim they were deceived by the "rosy" projections for future growth expressed by Field's misrepresentations in press releases of December 14 and 15, 1977, which recounted how "confident about the future of the company" management was, and that momentum within the company was excellent. The plaintiffs allege that these misrepresentations culminated in a public letter dated December 20, 1977.[5] The plaintiffs claim that this letter, which cited a thirteen percent increase in consolidated net income before ventures and taxes, was fatally misleading in that it failed to disclose that the defendants' "five-year plan," a projective document generated for internal management use only, showed at that time an anticipated decline of seven percent in consolidated net income for the year.

While it is true that there is no duty upon management or directors to disclose financial projections, see e.g., Freeman v. Decio, 584 F.2d 186, 199-200 (7th Cir. 1978), it is also axiomatic that once a company undertakes partial disclosure of such information there is a duty to make the full disclosure of known facts necessary to avoid making such statements misleading. Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033 (7th Cir.), cert. denied 434 U.S. 875, 98 S.Ct. 224, 225, 54 L.Ed.2d 155 (1977) (release of nine months earnings figures showing $1.16 earnings per share were made misleading by the failure to release existing accounting reports which defendants knew would require year-end write-offs resulting in a $0.15 loss per share); see Marx v. Computer Sciences Corp., 507 F.2d 485, 489-92 (9th Cir. 1974).

However, projections, estimates, and other information must be reasonably certain before management may release them to the public. Thus in the recent case of Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir. 1980), the Ninth Circuit rejected a claim that defendants had a duty to disclose internal projections during the course of a tender offer for its own shares. The court held "[i]t is just good general business practice to make such projections for internal corporate use. There is no evidence, however, that the estimates were made with such reasonable certainty even to allow them to be disclosed to the public." Id; see Berman v. Gerber Products, Inc., 454 F. Supp. at 1328; cf. First Virginia Bankshares v. Benson, 559 F.2d 1307, 1318 (5th Cir. 1977), cert. denied, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed.2d 802 (1979) (a lender's duty to disclose known irregularities in his debtor's accounts "resemble a recital of raw fact more that they resemble a prediction of future stock prices").

The earnings projections the plaintiffs allege should have been disclosed were contained in a five-year plan which had been hastily updated only the very day of the board meeting to consider the CHH first proposal. It was one of a series of five-year plans which were continually updated and used internally by Field's management to explore planning and development. That the projections it contained were highly tentative seems the compelling inference from the evidence that Field's projections varied from those of its own investment bankers, were considered merely "valid to use for the present purpose," of evaluating the Carter Hawley offer, and they ended up varying substantially from Field's performance as revealed by the actual year-end earnings which finally came in a full twenty-five percent down from the prior year. We therefore find that because the projections of the five-year plan were tentative estimates prepared for the enlightenment of managment with no expectation that they be made public, there was no duty to reveal them. Indeed, in light of the degree by which they failed to project the extent of the decline in earnings, release of the seven percent estimate might have subjected the defendants to securities law liability. Cf. SEC v. Texas Gulf Sulphur, 312 F.Supp. 77, 83-84 (S.D.N.Y. 1970), aff'd in part, rev'd in part, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1971) (optimistic press release misleading because not optimistic enough).

We therefore affirm the ruling of the district court that the plaintiffs failed to present sufficient evidence to support a reasonable jury finding of the element of deception required by Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.

IV. THE STATE LAW CLAIMS

The plaintiffs here have also sought to establish that the defendants committed two violations of state law. First, they contend, the defendants breached their fiduciary duty as directors to the corporation and its shareholders by adopting a secret policy to resist acquisition regardless of benefit to the shareholders or the corporation; by failing to disclose the existence of such a policy; by making defensive acquisitions; and by filing an antitrust suit against CHH. Second, they argue that the defendants interfered with the plaintiffs' economic advantage when that wrongful behavior caused CHH to withdraw its proposed tender offer before it became effective.

A. The Business Judgment Rule

(27-29) Under applicable Delaware corporate law, claims such as those made by the plaintiffs are analyzed under the "business judgment"rule. The trial court described this rule as establishing that

> (d) irectors of corporations discharge their fiduciary duties when in good faith they exercise business judgment in making decisions regarding the corporation. When they act in good faith, they enjoy a presumption of sound business judgment, reposed in them as directors, which courts will not disturb if any rational business purpose can be atributed to their decisions. In the absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not interfere with the exercise of business judgment by corporate directors.

486 F. Spp. at 1194 (citations omitted). We find this an apt summary of appropriate Delaware law.[6] See GM Sub Corp. v. Ligget Group, Inc., No. 6155, slip op. at 3 (Del.Ch. Apr. 25, 1980) (citing the

district court opinion with approval). In the recent case of Johnson v. Trueblood, 629 F. 2d 287 (3d Cir. 1980), the U.S. Court of Appeals for the Third Circuit had occasion to analyze the purpose of the Delaware business judgment rule in the context of a takeover attempt. The plaintiffs contended that an allegation of a purpose to retain control was enought to shift the burden to incumbent directors to show the rational business purpose of the disputed transaction. In rejecting that contention Chief Judge Seitz, formerly a Delaware Chancellor, stated:

First, the purpose of the business judgment rule belies the plaintiff's contention. It is frequently said that directors are fiduciaries. Although this statement is true in some senses, it is also obvious that if directors were held to the same standard as ordinary fiduciaries the corporation could not conduct business. For example, an ordinary fiduciary may not have the slightest conflict of interest in any transaction he undertakes on behalf of the trust. Yet by the very nature of corporate life a director has a certain amount of self-interest in everything he does. The very fact that the director wants to enhance corporate profits is in part attributable to his desire to keep shareholders satisfied so that they will not oust him.

The business judgment rule seeks to alleviate this problem by validating certain situations that otherwise would involve a conflict of interest for the ordinary fiduciary. The rule achieves this purpose by postulating that if actions are arguably taken for the benefit of the corporation, then the directors are presumed to have been exercising their sound business judgment rather than responding to any personal motivations.

Faced with the presumption raised by the rule, the question is what sort of showing the plaintiff must make to survive a motion for directed verdict. Because the rule presumes that business judgment was exercised, the plaintiff must make a showing from which a fact-finder might infer that impermissible motives predominated in the making of the decision in question.

The plaintiff's theory that "a" motive to control is sufficient to rebut the rule is inconsistent with this

> purpose. Because the rule is designed to validate certain transactions despite conflicts of interest, the plaintiff's rule would negate that purpose, at least in many cases. As already noted, control is always arguably "a" motive in any action taken by a director. Hence plaintiffs could always make this showing and thereby undercut the purpose of the rule.

Id. at 292-93 (emphasis added).

GM Sub Corp., supra, involved a shareholder's claim that the defendants, directors of a target company, divested the company of its most important asset in an attempt to make it less attractive to an ardent but unwelcome suitor. In analyzing this action under the Delaware business judgment rule, the court formulated the following test of the improper motive necessary to overcome the presumption of good faith:

> (N)ot every action taken by a board of directors to thwart a tender offer is to be condemned. The test, loosely stated, is whether the board is fairly and reasonably exercising its business judgment to protect the corporation and its shareholders against injury likely to befall the corporation should the tender offer prove successful.

Slip op. at 3.

(30) We also note that a majority of the directors of Field's were "independent": they derived no income from Field's other than normal directors' fees and the equivalent of an employee discount on merchandise. The presumption of good faith the business judgment rule affords is heightened when the majority of the board consists of independent outside directors. See, e.g., Warshaw v. Calhoun, 221 A. 2d 487, 493 (Del. 1966);

Puma v. Marriott, 283 A. 2d 693, 695 (Del. Ch. 1971).

(31) The plaintiffs suggest that director Blair's independence was called into question by the fact that his investment banking firm did work for Field's. In Maldonado v. Flynn, 485 F. Supp. 274 (S.D.N.Y. 1980), the court dismissed such an implication as "a non sequitur and hardly worthy of comment". Id. at 287. We agree. Even less relevant was the plaintiffs' attempt to show that director Smith's independence was weakened because he owned a substantial share of a bank in which Field's deposited monies and had other accounts. That inference is so attenuated that the trial court properly excluded the evidence as irrelevant.

(32) However, rather than

proceeding under the business judgment rule, the plaintiffs here seek to apply a different test in the takeover context, and propose that the burden be placed upon the directors to establish the compelling business purpose of any transaction which would have the effect of consolidating or retaining the directors' control. In light of the overwhelming weight of authority to the contrary, we refuse to apply such a novel rule to this case. Crouse-Hinds Co. v. InterNorth, Inc. 634 F. 2d 690, 701-03 (2d Cir. 1980); Treadway Cos. v. Care Corp., No. 80-7335, slip op. at 5017 (2d Cir. Aug. 12, 1980); Johnson v. Trueblood, supra, Gimbel v. Signal Cos., 316 A.2d 599,601, 609, (Del. 1974); Sinclair Oil Corp. v. Levien, 280 A. 2d 717, 720 (Del. 1971); Warshaw v. Calhoun, 221 A.2d 487 (Del.

1966); GM Sub Corp., supra; Kaplan v. Goldsamt, 380 A. 2d 556, 568 (Del. Ch. 1977). To the extent that dicta in Klaus v. HiShear Corp., 528 F. 2d 225 (9th Cir. 1975), suggest a different result under the corporation law of California, we decline to follow that rule.

Copperweld Corp. v. Imetal, 403 F. Supp. 579, 608 (W.D. Pa. 1975), also relied on by the plaintiffs, is inapposite to this case. It involved no charge of a breach of fiduciary duty, but was rather a target company's suit for a preliminary injunction against the acquisition of its shares by a foreign tender offeror. The court there referred to shareholders only while considering as a relevant factor to issuance of the injunction the possibility of harm to interested persons not parties to the suit. The "absence of compelling reason" referred not to any business purpose, but rather to the failure of the plaintiffs to demonstrate a likelihood of success on the merits or the danger of irreparable harm. The case provides no support for the plaintiffs' novel theory of directors' liability. Analyzing the plaintiff's evidence under the well-established test, we find the thorough and fair-minded evaluation of the district court amply disposes of the issues.[7]

B. THE BREACH OF FIDUCIARY DUTY.

1. The Policy of Independence.

The Plaintiffs contend that they have presented sufficient evidence to go to the jury on the existence of the secret policy, both circumstantially, from the history of prior rebuffs, and directly, from the testimony of two Field's directors.

On the resistance to prior approaches, we have established above that evaluation and response to such approaches is within the scope of the directors' duties. The plaintiffs have presented no evidence of self-dealing, fraud, overreaching or other bad conduct sufficient to give rise to any reasonable inference that impermissable motives predominated in the board's consideration of the approaches. The desire to build value within the company, and the belief that such value might be diminished by a given offer is a rational business purpose. The record reveals that appropriate consideration was given to each individual approach made to Marshall Field & Company.[8] The plaintiffs have failed to introduce evidence supporting a reasonable inference that any of the rejections of these approaches were made in bad faith. Therefore the presumption of good faith afforded by the business judgment rule applies, and the plaintiffs cannot survive the motion for directed verdict.

Having failed to establish the presence of an improper motive in any one of the defendants' responses to acquisition approaches, the plaintiffs seek to establish from the series of rejections the illogical inference that this reflects an invidious policy of independence regardless of benefit to the shareholders. All that the plaintiffs' evidence in this regard establishes is that Field's directors evaluated the merits of each approach made, and determined to implement their decisions as to each of the approaches by following the advice of counsel on how to respond to unwanted acquisition approaches.

The mere fact that two of the ten directors felt that the word "independence" reflected the board policy of trying to build value within the company rather than putting it up for sale, does not reveal an impermissable motive to reject all acquisition attempts regardless of merit. Furthermore, there is testimony by both directors who used the word "independent" that neither meant it resistance at all costs, or against the best interests of the shareholders. We, therefore, affirm the district court's holding that the plaintiffs failed to raise a jury question on the issue of the alleged policy of independence.

The plaintiffs also contend that failure to reveal the prior rebuffs or the policy of independence amounted to a breach of fiduciary duty. None of the prior attempts ever rose to the level of a definite offer or merger proposal. Directors are under no duty to reveal every approach made by a would-be acquiror or merger partner. See Missouri Portland Cement Co. v. H.K. Porter Co., 535 F.2d 388, 398 (8th Cir.1976); Berman v. Gerber Products, 454 F.Supp. 1310, 1318 (W.D.Mich.1978); Elgin National Industries, Inc. v. Chemetron Corp., 299 F.Supp. 367, 371 (D.Del.1969). Thus, there was no breach of fiduciary duty in the failure to disclose prior takeover attempts. Neither can there be liability for a failure to disclose the policy of resistance. Because we have found that it is not reasonable to infer that such a policy existed, there can be no liability for failure to disclose it. Vaughn v. Teledyne, 628 F.2d 1214, 1221 (9th Cir.1980).

2. The Defensive Acquisitions.

The plaintiffs also contend that the "defensive" acquisitions of the five Liberty House stores and the Galleria were imprudent, and designed to make Field's less attractive as an acquisition, as well as to exacerbate any antitrust problems created by the CHH merger. It is precisely this sort of Monday-morning-quarterbacking that the business judgment rule was intended to prevent. Again, the plaintiffs have brought forth no evidence of bad faith, overreaching, self-dealing or any other fraud necessary to shift the burden of justifying the transactions to the defendants. On the contrary, there was uncontroverted evidence that such expansion was reasonable and natural. Thus even if the desire to fend off CHH was among the motives of the board in entering the transactions, because the plaintiffs have failed to establish that such a motive was the sole or primary purpose, as has been required by Delaware law since the leading case of Cheff v. Mathes, 41 Del.Ch.494, 199 A.2d 548 (1964), the mere allegation, or even some proof, that a given transaction was made on "unfavorable" terms does not meet the fairly stringent burden the business judgment rules imposes on plaintiffs.[9]

3. The Antitrust Suit.

The plaintiffs also contend that the bringing of the antitrust suit against CHH was a breach of the directors' fiduciary duty. Because it is the duty of the directors to file an antitrust suit when in their business judgment a proposed combination would be illegal or otherwise detrimental to the corporation, see Chemetron Corp. v. Crane Co., 1977-2 Trade Cas. ¶61,717 at 72,933 (N.D.Ill.1977); Gulf & Western Industries, Inc. v. Great A & P Tea Co., 476 F.2d 687, 698 (2d Cir.1973), their decision to file an antitrust suit is also within the scope of the business judgment rule. There was substantial evidence before the court that the defendants were fairly and reasonably exercising their business judgment to protect the corporation against the perceived damage an illegal merger would cause, see Copperweld Corp. v. Imetal, 403 F.Supp. 579, 607 (W.D.Pa. 1975) ("no doubt that [divestiture] would have a debilitating effect on the acquired company....).

Not only were the directors acting in good faith reliance on the advice of experienced and knowledgeable antitrust counsel, which in itself satifies the requirements of the business judgment rule, Spirt v. Bechtel, 232 F.2d 241, 247 (2d Cir.1956); Voege v. Magnavox Co., 439 F.Supp. 935, 942 (D.Del.1977), but one member of the board was an experienced antitrust lawyer with a background of experience to evaluate the soundness of the legal claims. See Abramson v. Nytronics, Inc., 312 F.Supp. 519, 531-32 (S.D.N.Y.1970) ("Boards of directors are deliberately chosen from the ranks of businessmen, bankers, and lawyers because of their expertise in evaluating the merits of precisely this sort of proposal."). The plaintiffs have introduced no evidence that the suit was brought in bad faith, but merely cite it as an example of the defendants' desire to perpetuate their control. However, because the bringing of the suit clearly served the rational business purpose of protecting Field's from the damage forced divestiture would cause, it is protected by the business judgment rule. Field's decision to resolve the antitrust question through litigation in federal court rather than some other method or in some other forum is a matter for the discretion of the directors when it is exercised within the scope of the rule.

Because we find insufficient evidence on which a jury could base a rational verdict that the defendants breached any fiduciary duty, neither can any claim of concealment of bad faith activity give rise to a jury question. We therefore affirm the district court's ruling on the state law claims of breach of fiduciary duty.

C. INTERFERENCE WITH PROSPECTIVE ADVANTAGE.

It is a hornbook law that the actions complained of in a claim for intentional interference with prospective advantage must be wrongful. W. Prosser, Torts, §130 at 951 (4th ed.1971). See Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 360 (2d Cir.), cert. denied, 414 U.S. 910, 94 S.Ct. 231, 38 L.Ed.2d 148 (1973); A & K Railroad Materials, Inc. v. Green Bay & Western Railroad, 437 F.Supp. 636, 645-46 (E.D.Wis.1977); see Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 16 Ill.App.3d 709, 714, 306 N.E.2d 549, 553 (1973), rev'd on other grounds, 61 Ill.2d 129, 334 N.E.2d 160 (1975) (plaintiff claimed that malicious falsehoods in credit report prevented it from entering further dealings with potential creditors; "[d] efamatory statements may in themselves give rise to a cause of action for libel or slander and, at the same time, become the means by which the [tort] of interference with...prospective economic advantage [is] committed."). [10]

In City of Rock Falls v. Chicago Title & Trust Co., 13 Ill. App.3d 359, 362-63, 300 N.E.2d 331, 333 (1973), the Appellate Court of Illinois aptly summarized the rationale for this requirement:

> The theory of the Tort of interference, it is said, is that the law draws a line beyond which no member of the community may go in intentionally intermeddling with the business affairs of other; that if acts of which complaint is made do not rest on some legitimate interest, or if there is sharp dealing or overreaching or other conduct below the behavior

> of fair men similarly situated, the ensuing loss should be redressed; and that line of demarcation between permissable behavior and interference reflects the ethical standards of the community.

Id. Because we have held that the trial court correctly found that the plaintiffs did not present sufficient evidence of such improper behavior on the part of the defendants, we must affirm as to this ground as well.

Furthermore, Illinois courts have consistently held that the plaintiff must allege and prove facts which demonstrate that the defendants acted with the purpose of injuring the plaintiffs' expectancies. Herman v. Prudence Mutual Casualty Co., 41 Ill.2d 468, 473, 244 N.E.2d 809, 812 (1969); Crinkley v. Dow Jones & Co., 67 Ill.App.3d 869,880, 24 Ill.Dec. 573, 584, 385 N.E.2d 714, 722 (1978); Parkway Bank & Trust Co. v. City of Darien, 43 Ill.App3d 400, 403-04, 2 Ill.Dec. 234, 237-38, 357 N.E.2d 211, 215 (1976). As is demonstrated above, the plaintiffs have failed to provide sufficient evidence that the directors were acting out of other than good-faith motives with the well-being of the corporation foremost in their minds. The plaintiffs have thus also failed to establish this requisite element of improper intent.

To adopt the rule the plaintiffs seek to impose here would substantially obtenebrate the reasonableness of consideration by board of directors of a tender offer, and is in direct conflict with the duty of directors to evaluate proposed business combinations on their merits and oppose those detrimental to the well-being of the corporation even if that is at the expense of the short term interests of individual shareholders. See Gulf & Western Industries, 476 F.2d at 698; Elco v. Microdot, Inc., 360 F.Supp. 741, 754-55 (D.Del.1973)(if an acquisition would violate the antitrust laws, the interests of shareholders in tendering their shares "must yield," although "barring consummation of this tender offer will deprive these stockholders of their premium," since "this is a premium to which they cannot justly lay claim"); cf. Kors v. Carey,39 Del. Ch. 47, 158 A.2d 136, 140 (1960) (concern with antitrust violations evidences directors' proper discharge of fiduciary duty). In the absence of sufficient evidence that the directors acted improperly to overcome the presumption of the business judgment rule, a case cannot proceed to the jury on an interference with prospective economic opportunity theory.

V. CONCLUSION

We therefore conclude, as did the district court, that the plaintiffs have failed to provide a sufficient evidentiary basis on which reasonable jurors could find violations of either the federal securities laws, or state law. The judgment of the district court is affirmed.

CUDAHY, Circuit Judge, concurring in part and dissenting in part:

Unfortunately, the majority here has moved one giant step closer to shredding whatever constraints still remain upon the ability of corporate directors to place self-interest before shareholder interest in resisting a hostile tender offer for control of the corporation. There is abundant evidence in this case to go to the jury on the state claims for breach of fiduciary duty. I emphatically disagree that the buiness judgment rule should clothe directors, battling blindly to fend off a threat to their control, with an almost irrebuttable presumption of sound business judgment, prevailing over everything but the elusive hobgoblins of fraud, bad faith or abuse of discretion. I also disagree with the majority's view that misleading and deceptive representations about an offeror's proposal are immunized from the proscriptions of Section 14(e) if the offer is withdrawn before the shareholders have an opportunity to tender.

On the other hand, I agree with the majority that many of the Securities Act misrepresentation claims here represent impermissible transmutations of claims for breach of fiduciary duty into federal security violations. This result is frequently obtained through allegations that the failure of directors to disclose the culpability of their activities or their improper motives are unlawful misrepresentations. There is, however, at least one clear exception. The jury should have been allowed to consider the company president's public letter of December 20, 1977, claiming a 13% increase in consolidated net income for the nine months ended October 31, when management expected a decline in earnings for the full year.

I.

Addressing first the state law

claims of breach of fiduciary duty by the Board, the majority has adopted an approach which would virtually immunize a target company's board of directors against liability to shareholders, provided a sufficiently prestigious (and expensive) array of legal and financial talent were retained to furnish post hoc rationales for fixed and immutable policies of resistance to takeover. Relying on several recent decisions interpreting the Delaware business judgment rule, the majority fails to make the important distinction

> between the activity of a corporation in managing a business enterprise and its function as a vehicle for collecting and using capital and distributing profits and losses. The former involves

> corporate functioning in competitive business affairs in which judicial interference may be undesirable. The latter involves only the corporation-shareholder relationship, in which the courts may more justifiably intervene to insist on equitable behavior.

Note, Protection for Shareholder Interests in Recapitalizations of Publicly Held Companies, 58 Colum.L.Rev. 1030, 1066 (1958) (emphasis supplied.)

The theoretical justification for the "hands off" precept of the business judgment rule is that courts should be reluctant to review the acts of directors in situations where the expertise of the directors is likely to be greater than that of the courts. But, where the directors are afflicted with a conflict of interest, relative expertise is no longer crucial. Instead, the great danger becomes the channeling of the directors' expertise along the lines of their personal advantage--sometimes at the expense of the corporation and its stockholders.[1] Here courts have no rational choice but to subject challenged conduct of directors and questioned corporate transactions to their own disinterested scrutiny. Of course, the self-protective bias of interested directors may be entirely devoid of corrput motivation, but it may nonetheless constitute a serious threat to stockholder welfare. See Gelfond and Sebastian at 435-37 (footnotes omitted).

Despite this potential for abuse, the majority relies heavily on the business judgment rule's presumption of good faith in the exercise of corporate decision-making power and attaches special significance to the "independence" of Field's Board. Maj. op. ante at 294.[2] The fact that Field's may have had a majority of non-management (independent) directors is hardly dispositive. The interaction between management and board may be very strong even where, as here, a relationship of symbiosis seems to prevail over the normal condition of "management domination."[3] Whether the relationship is symbiotic or management "dominates," I do not think it necessary to rely primarily on such directly pecuniary relationships as one director's senior partnerhip in Field's investment banking firm (although this was admittedly a quite profitable arrangement) or another director's ownership of stock in a Field's depository bank (obviously a more attenuated interest) to establish a conflict of interest here. These factors deserve appropriate attention. But the very idea that, if we cannot trace with precision a mighty flow of dollars into the pockets of each of the outside directors, these directors are necessarily disintered arbiters of the stockholders' destiny, is appallingly naive.

Directors of a New York Stock Exchange-listed company are, at the very least, "interested" in their own positions of power, prestige and prominence (and in their not inconsequential perquisites.)[4] They are "interested" in defending against outside attack the management which they have, in fact, installed or maintained in power--"their" management (to which, in many cases, they owe their directorships). And they are "interested" in maintaining the public reputation of their own leadership and stewardship against the claims of "raiders" who say that they can do better. Thus, regardless of their technical "independence," directors of a target corporation are in a very special position, where the slavish application of the majority's version of the good faith presumption is particularly disturbing.

Under the business judgment rule, once a plaintiff demonstrates that a director had an interest in the transaction at issue, the burden of proof shifts to the director to prove that the transaction was fair and reasonable to the corporation. Treadway Companies v. Care Corp., 638 F.2d 357 at 382 (2d Cir. 1980). Accord, Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d 1980). There was more than sufficient evidence in the instant case to permit the jury to shift the burden of proof to Field's directors and to consider the reasonableness of the transactions. The majority here, however, affirms a directed verdict which determines that the evidence was insufficient as a matter of law to establish that Field's directors were interested in this transaction. A brief examination of the majority's "overwhelming weight of authority" demonstrates that even these cases do not support its notion of the quantum of evidence necessary to create a jury question in this case.

In Crouse-Hinds Co. v. InterNorth, 634 F.2d 690 (2d Cir. 1980), the tender offeror (InterNorth) arrived on the scene after a merger of the target (Crouse-Hinds) with a third party (Belden) had been announced. The tender offeror sought to enjoin preliminarily an exchange of stock in furtherance of the merger on the grounds that the exchange was designed merely to perpetuate the target management in office.[5] Even though the target directors were allegedly "interested" in the merger because they would remain in control of the new corporation after its consummation, the court declined to shift the burden of proof to the director for essentially two reasons.[6] First, at the time the merger was negotiated, the tender offeror had indicated no interest in the target and, hence, the directors could not have been motivated by a desire to retain control. Second, the tender offer was conditioned on abandonment of the merger and the target company directors' attribution of the exchange of stock to the facilitation of the merger was entirely credible.

Crouse-Hinds is distinguishable from the instant case in at least two respects. First, the Crouse-Hinds/

Belden merger, which provided the basis for the self-interest charges, was negotiated prior to the tender offer. There was sufficient evidence (independent of any judgment made after the takeover attempt had been announced) to demonstrate that the combination was in the best interest of the stockholders. Thus, any activity to facilitate the merger after the tender offer could legitmately be ascribed to a valid business purpose.

In the present case, however, the challenged board activity occurred after CHH made known its acquisitive intentions. The responses of Field's Board could not be justified, as they were in Crouse-Hinds, on documented negotiations and decisions made prior to the tender offer. When reviewed against a background of cast-in-concrete hostility to merger offers, the hasty acquisition of five Liberty House stores in the Pacific Northwest (two of which were acknowledged "dogs"), the $17 million commitment for a Field's store in the Galleria complex in Houston, Texas (the site of a CHH Neiman-Marcus store) and the institution of a major antitrust action within hours of a merger proposal (ostensibly on the mere oral opinion of company counsel) represent some of the facts from which a jury might reasonably conclude that the directors improperly sought to perpetuate their control of the corporation. See pp.304-310, infra.

Crouse-Hinds is also distinguishable from the instant case in that the Crouse-Hinds court as factfinder did consider and evaluate the merits of the self-interest claim.[7] The district court and the majority here, however, refuse to allow the jury as factfinder to consider and evaluate any evidence of the directors' self-interest. Thus, Crouse-Hinds cannot legitimately support the affirmance of the directed verdict in the instant case.

The recent decision in Treadway Companies v. Care Corp. No. 80-7335 (2d Cir. Aug. 12, 1980), is similarly inappropriate authority for the majority's result. In Treadway, the tender offeror (Care) challenged the issuance and sale of a substantial number of shares of the target company (Treadway) to a third company (Fair Lanes) on the ground that Treadway's directors improperly approved the sale to perpetuate their control over the corporation.[8] Although the district court denied Care's request for injunctive relief, the court later ruled in Care's favor at the bench trial on the merits and permanently enjoined the voting of the disputed shares. In evaluating the motivation of the Treadway directors, the district court examined "both the manner in which the sale agreement was entered into and negotiated and the ostensible justification of the sale itself." Treadway, at 372. The court was disturbed by: 1) the haste with which the Treadway-Fair Lanes negotiations had been conducted; 2) a consistent effort to structure the proposed transactions to avoid shareholder scrutiny; and 3) the lack of a good faith effort by the Treadway management to determine whether a takeover by Care would or would not be in the best interest of the corporation. Id. These factors led the court to conclude that the Board had breached its fiduciary duty by improperly seeking to perpetuate its control.

On appeal, the Second Circuit examined the business judgment rule and explained:

> In nearly all of the cases treating stock transactions intended to affect control, the directors who approved the transaction have had a real and obvious interest

> in it: their interest in retaining or strengthening their control of the corporation. It is this interest which causes the burden of proof to be shifted to the directors, to demonstrate the propriety of the transactions. (Citations omitted) ... [Thus,] in attacking a transaction that was intended to affect control, plaintiff ... bears the initial burden of proving that the directors had an interest in the transaction, or acted in bad faith or for some improper purpose.

Treadway, at 382 (emphasis supplied). Although the court ultimately found that the Treadway Board had not acted to maintain control, the case does not, for several reasons, require a similar result in favor of Field's directors.

First, the Treadway court premised its finding on Care's failure to show that all or even a majority of the directors had a personal interest in having the merger consummated. Only one director (Lieblich) had been promised a position in the merged corporation, and the district court had explicitly found that the other directors expected to lose their board positions if the merger went through. It was therefore reasonable to conclude that the decision to merge was not motivated by the desire of these disinterested directors to perpetuate their control of the corporation. Treadway, at 383.

More importantly, however, the

Treadway court agreed that "there was ample evidence to support a finding that Lieblich acted improperly and determined, for his own selfish reasons and without giving the matter fair consideration, to oppose a Care takeover at all costs." Treadway, at 383. The fact that the court was unable to attribute Lieblich's improper motives to the other directors or to find that Lieblich dominated the Board does not diminish the conclusion that Lieblich's action was improper. The district court analysis was thus valid insofar as it related to a director who had an interest in maintaining his position as a director.

In the present case, the directors had a personal interest in defeating the takeover attempt--"their interest in retaining or strengthening control of the corporation." See Treadway, at 382. Therefore, under the business judgment rule's burden-shifting doctrine the Board should be required to demonstrate that these transactions were fair and reasonable to the corporation. As in Treadway, the haste with which the Board acted in making acquisitions and filing a major lawsuit, the absence of shareholder scrutiny of any of the Board's actions and the apparent lack of a good faith effort to determine whether the takeover was really in the shareholder's best interest are troublesome.

Moreover, the Treadway court as factfinder had the opportunity to consider all of the evidence of director self-interest and decide the merits of the fiduciary duty claims. The district court's directed verdict here, however, decided as a matter of law that similar, if not stronger, evidence was insufficient to sustain the charges of self-interested misconduct. Based on Treadway, it was surely improper for the district court to take these claims from the jury.

The majority also relies on Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980) and quotes from Chief Justice Seitz's opinion essentially to establish that self-interest must be the sole or primary motive underlying a director's challenged action rather than merely "a" motive when control is implicated. The issue arose in Trueblood, however, in the context of how a jury was to be charged, not whether the evidence should go to a jury at all. The Trueblood court concluded (and the majority here agrees) that to survive a motion for a directed verdict, the "plaintiff must make a showing from which a factfinder might infer that impermissible motives predominated in the making of the decision in question." Id. at 292-93. Regardless whether "a" self-interested motive is sufficient or whether a "primary" self-interested motive is requisite, there is sufficient evidence in the instant case to satisfy either standard. See pp. 304-310, infra. Nothing in Trueblood supports the view that the district court properly foreclosed jury consideration of the claims of Field's shareholders.

Beyond this, however, I believe that Judge Rosenn's dissent in Trueblood states the proper interpretation of the business judgment rule in control cases: "Once a plaintiff has shown that the desire to retain control was 'a' motive in the particular business decision under challenge, the burden is then on the defendant to move forward with the evidence justifying the transaction as primarily in the corporation's best interest." Trueblood, 629 F.2d at 301. This statement of the rule is compatible with both the Delaware case law[9] and the realities of corporate governance, and is by no means a minority position. In Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975), the logic of which the defendants ignore and the majority chooses to reject, the Court of Appeals for the Ninth Circuit approved the application of a rigorous rule which required directors of a target company, as fiduciaries, to demonstrate a "compelling business purpose" for their actions. Id. at 233-34. The Klaus standard is entirely consistent with the standard which the Second Circuit clearly spelled out in Treadway and left intact in Crouse-Hinds. See note 6, supra. See also Podesta v. Calumet Indus. Inc., [1978 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶96,433 (N.D.Ill. 1978); Royal Indus., Inc. v. Monogram Indus., [1976-77 Transfer Binder] Fed.Sec.L. Rep. (CCH) ¶95,863 (C.D.Cal. 1976).

Thus, the majority here has no basis for asserting that in "control" cases an interpretation of the business judgment rule which shifts the burden of proof to interested directors and requires them to establish a valid business purpose for their actions is a "novel" rule contrary to the "overwhelming weight of authority."[10] In none of the cases cited by the majority was the factfinder (whether judge or jury) precluded from evaluating the merits of the fiduciary duty claims. In the instant case, on the other hand, similar claims are buffered against jury examination by the *cordon sanitaire* of a distorted business judgment rule.

II.

The basic error of the majority in the instant case is in holding as a matter of law that there was insufficient evidence to go to the jury on the state claims of breach of fiduciary duty. In reviewing a directed verdict, this court must evaluate the evidence in a light most favorable to the appellant and determine "whether it is of sufficient probative value that members of the jury might fairly and impartially differ as to the inferences to be reasonably drawn therefrom." _Hohmann v. Packard Instrument Co._, 471 F.2d 815 (7th Cir. 1973). _See also Chillicothe Sand & Gravel Co. v. Martin Marietta Corp_. 615 F.2d 427 (7th Cir.

1980). There was abundant evidence from which a jury in this case could have concluded that Field's directors breached their fiduciary duties to the shareholders: 1) by pursuing a fixed, nondebatable and undisclosed policy of massive resistance to merger with, or acquisition by, a series of the nation's foremost retailers; 2) by making hasty and apparently imprudent defensive acquisitions to reduce Field's attractiveness as a takeover candidate and to force the withdrawal of the CHH offer; and 3) by hastily filing a major antitrust suit to further impair persistent acquisitive efforts of CHH.

Reviewing first the evidence on the existence of a policy of independence in a light most favorable to appellants, it is difficut to understand the basis for the majority's conclusion that jurors could not fairly and impartially differ as to the inferences to be drawn from the facts presented. See Hohmann, 471 F.2d at 820. Marshall Field's Board of Directors had long been aware of the fact that the company's "accumulated worth, strong balance sheet, large cash reserves and borrowing potential" made Field's vulnerable to an involuntary merger or takeover. Panter v. Marshall Field & Co., 486 F.Supp. 1168 (N.D.Ill. 1980). In December 1969, at approximately the same time that Associated Dry Goods expressed an interest in acquiring Field's, the Board retained Joseph Flom of the New York law firm of Skadden, Arps, Slate, Meagher & Flom for advice on defeating takeover bids. Id. at 1175-76. Flom recommended the application of his "pyramid theory" which is based on the principle that the best way to remain independent is to acquire other enterprises.[11] In this way, Field's would either become too large to be acquired or would have so much overlap that acquisition of Field's by another major retailer would inevitably create antitrust problems.

While the majority notes that Flom advised the Board to be interested and listen carefully to proposals from other retailers, the majority apparently overlooks the curious coincidence that Field's made a major acquisition and/or raised antitrust problems to fight off virtually every serious merger or takeover attempt after the company hired Flom. See maj. op. ante at 278. In response to the interest of Associated, a predominantly Ohio and Pennsylvania operation, Field's conveniently acquired the Cleveland and Erie retail operations of Halle Brothers. Panter, 486 F.Supp. at 1177. These stores have, however, been less than profitable for Field's in the decade since they were acquired. See Plaintiffs' Exhibits 370, 372.

Similarly, after a merger proposal from Federated Department Stores in 1975, Field's actively employed Flom's antitrust approach to a takeover. Record at 2101-03. No major acquisition was necessary in this instance because

Federated's Chicago Division of I. Magnin and the Chicago, Seattle, and Milwaukee-based Boston Stores (which Federated offered to divest[12]) created sufficient antitrust leverage for Field's to stave off the unwelcome opportunity. Again, in 1976, Field's was under siege by Dayton-Hudson, but sought to acquire overlapping stores in Portland, Oregon and Tacoma, Washington from Liberty House.[13] Although Field's Board vociferously contends that its fascination with the Pacific Northwest was part of a long-range plan to sustain growth and profitability, the Board's interest in the Liberty House stores coincidentally subsided as Dayton-Hudson's interest in Field's waned. See Panter, 486 F.Supp. at 1177.

Finally, it should surprise no one that Field's initial response to the CHH proposal was to raise antitrust questions and hastily seek to acquire retail operations which were adjacent to CHH operations. See pp. 306-312 infra.

The majority accepts the defendants' claim that the Board's responses were tailored to a "desire to build value within the company and the belief that such value might be diminished by a given offer." Maj. op. ante at 296.[14] But one man's desire to "build value" may be another man's desire to "keep control at all costs," and a jury must decide which characterization is most consistent with the facts. A properly charged jury could have fairly concluded that Field's carefully weighed each merger or takeover offer to determine stockholder interest, but they could have just as fairly concluded that Field's carefully built its defenses against each offer without regard to stockholder interest. A directed verdict on these claims is therefore indefensible.

The plaintiffs also presented extensive evidence to substantiate their claims that Field's Board gave the CHH merger proposal no bona fide consideration and instead engaged in classic anti-takeover maneuvers. Throughout the busy Christmas season, the Board hastily solicited and apparently imprudently consummated several defensive acquisitions to reduce the company's attractiveness as a takeover candidate, create additional antitrust problems and ultimately force the withdrawal of the CHH offer. The documentary and testimonial evidence presented at trial provided a sufficient basis from which a jury could conclude that Field's Board in this respect breached its fiduciary duty.

The Board first learned of the CHH interest at a meeting following the death of Field's then chief executive, Joseph Burnham, in October 1977. _Panter_, 486 F.Supp. 1178. A resolution passed at that meeting announced the Board's swift and uncompromising response: "The proposed business combination _should not be considered_ because the best interests of the company's shareholders would be served by ...

continuing as an independent entity." Id. (emphasis added). When CHH presented a formal merger proposal to the Board on December 12, 1977, the directors received a limited review of the financial aspects of the merger,[15] heard conflicting reports on Marshall Field's future earnings,[16] and rejected the CHH proposal as "illegal, inadequate and not in the best interest of Marshall Field & Co., its stockholders and the community which it serves." Id. at 1181.

Less than two weeks later (and only four days before Christmas), a committee of Field's officers and investment bankers reviewed a list of candidates available for immediate acquisition by Field's. Record at 553.

Within ten days of this meeting, committee members met with the principal stockholders of Dillard's, a southwestern retailer in direct competition with CHH's Neiman-Marcus division, to see if a deal could be struck.[17] Record at 555-57. Correspondence from one of Field's investment bankers established that the Board sought a speedy transaction which would not require shareholder approval.[18] Because there was no time for a full scale financial analysis, the banker relied on "the intuitive judgment[of a Field's officer] as to the business potential" of the acquisition. Plaintiffs' Exhibit 137. The deal ultimately fell through, however, when Dillard's was purchased by Dutch interests. Record at 578-79.

Shortly after the demise of the Dillard's deal, Field's Board considered a proposal to acquire five Liberty House stores in the Pacific Northwest.[19] In the absence of any historical operating data,[20] and despite reports from Field's Vice-President of Corporate Development that the estimated earnings potential of these stores was marginal,[21] the Board unanimously approved a $24 million agreement to purchase these operations. Record at 603. The acquisition was publicly announced the following day. Plaintiffs' Exhibit 154.

Field's Board supplemented its sudden interest in acquiring operating retail stores with a hasty investigation of opportunities for expansion in two major shopping centers. While members of the acquisition team were concentrating on Dillard's, Field's Vice-President in charge of real estate was assigned to negotiate with Homart Development Corporation, managers of Northbrook Count in Chicago's northern suburbs. Although the Board had rejected an earlier plan to develop a Field's store in this shopping center,[22] their renewed interest could be credited to the fact that Neiman-Marcus had a successful operation in the same location.[23] The center was designed to contain four anchor stores, and Homart had commitments from four major tenants. The Field's representative pressed for the creation of a fifth anchor, but the negotiations ultimately fell apart. Record at 391-92.

The Board was more successful in its efforts to acquire space in the Galleria, an exclusive shopping center in Houston, Texas and of course, the location of another Neiman-Marcus store). In less than a month, Field's Board received an initial presentation on the Galleria,[24] authorized negotiations for a lease[25] and approved a $17 million dollar commitment to establish the first Marshall Field's store outside the Chicago area.[26] The letter of agreement between Field's and the Galleria management was signed one day after CHH made a formal tender offer to purchase Field's stock at $42 per share. The agreement was announced on February 8, 1978, and shortly thereafter, CHH withdrew its offer because Field's expansion program[27] had "created sufficient doubt about Marshall Field's earning potential to make the offer no longer in the best interest of CHH shareholders." Plaintiffs' Exhibit 345.

The majority reviewed this sequence of events and concluded that there was "uncontroverted evidence that such expansion was reasonable and natural." Maj. op. ante at 297. There was more than sufficient evidence here, however, for a jury to conclude that it was not "reasonable and natural" for the directors of a major retailer to make expansion commitments totalling more than $40 million dollars during and shortly after a busy Christmas season in which their "top priority" was to help a new chief executive officer become familiar with Field's operation.[28] Particularly when considered with the evidence of a long-standing and uncompromising policy of independence, I am astonished that the business judgment rule under any guise could keep this case from the jury.

Finally, the plaintiffs presented sufficient evidence to survive a directed verdict on the claim that Field's directors breached their fiduciary duty to the shareholders by filing a major antitrust suit against CHH within hours of the receipt of CHH's first merger proposal. The majority here has concluded that the defendants were "fairly and reasonably exercising their business judgment to protect the corporation against the perceived damage an illegal merger could cause." Maj. op. ante at 297. Once again, however, the facts presented at trial could easily support a quite different conclusion.

CHH President Philip Hawley informed Field's President, Angelo Arena, on December 10th that CHH intended to make a formal merger proposal within two days unless Field's agreed to enter serious negotiations with CHH representatives. Record at 1341. Arena then hastily assembled one director, one officer and several of Field's investment bankers and lawyers in New York on Sunday, December 11th at an emergency meeting. Panter, 486 F.Supp. at 1180; Record at 457-59,2861-62. Although Arena had privately solicited an opinion on the antitrust implications of a merger with CHH from Kirkland & Ellis, no Kirkland & Ellis representative attended the meeting. Record at 459. Arena reported, however, that he had received oral confirmation from a Kirkland attorney that the proposed merger was illegal. Panter, 486 F.Supp. at 1181. Two prominent law firms representing CHH had also reviewed the matter and believed an adequate agreement could be worked out to avoid any antitrust problems.[29] Id. at 1180. However, without written legal analysis and without further discussion, the emergency anti-takeover cabal agreed that Field's would file an antitrust suit against CHH and solicit investigatory action by the FTC,[30] the SEC and the Illinois Securities Commission[31] to help block the merger. Arena then called each director not present at the meeting, briefly outlined the antitrust problem and obtained authorization to file the suit. Id. at 1181. The following day, the Board issued a press release announcing the merger proposal and stating that a suit had been filed. Plaintiffs' Exhibit 113.

A jury considering this evidence could have found that Field's Board failed to adequately review the legal aspects of the proposed merger with CHH. In addition to hastily approving a lawsuit arguably based on insubstantial antitrust claims (involving quite remediable problems), the Board made defensive acquisitions which bolstered those claims, drained Field's of cash and ultimately led to the withdrawal of the CHH offer. The jury could have concluded that the directors in a sense used Field's own assets against the shareholders to defeat the takeover proposal of a high quality retailer which essentially doubled the market price of Field's stock.[32] With these findings, a jury charged even under the defendants' version of the business judgment rule could have decided the case for plaintiffs.

One may, of course, argue that what the directors did here was merely to make the normal reflexive response of incumbent management to efforts by outsiders to take over control of a corporation. In fact, applicable federal and state takeover legislation suggests that incumbent management--protective of its own powers and perquisites--may almost automatically attempt to defeat hostile tender offers, whatever their merits.[33] These assumptions may reflect a realistic view of human and corporate nature, and perhaps the law should simply excuse directors for thing of themselves first and stockholders second in the event of a threatened takeover. In that regard I do not perceive the actions of Field's directors here as necessarily more egregious than many others in like circumstances. But under the legal norms which now must guide us (and no matter who has the burden of proof), there is not good reason to take this unfortunately too typical, but nonetheless important and substantial, case from the jury.

III

In addition, I disagree with the majority's conclusion that, because the CHH tender offer was withdrawn before plaintiffs had the opportunity to decide whether or not to tender their shares, any deception which Field's Board might have practiced cannot be a violation of Section 14(e) of the Williams Act. Maj. op. ante at 283-285. The type of rule which the majority advocates is simply an invitation to incumbent management to make whatever claims and assertions may be expedient to force withdrawal of an offer. Management could speak without restraint knowing that once withdrawal is forced there is no Securities Act liability for deception practiced before withdrawal took place. Such a rule provides a major loophole for escaping the provisions of Section 14(e) and obviously frustrates the remedial purpose of the Act.

'It is well settled that [s]tatements made by either the offeror or the target company prior to the actual effective date of a tender offer but after the announcement of the offer and preliminary filings fall within the purview of § 14(e) ... During this interim period the policies behind Section 14(e) apply with as much force as they do following the effective date of the offer." *Berman v. Gerber Products Co*., 454 F.Supp.1310, 1318 (W.D.Mich.1978) (footnotes omitted and emphasis added). The management of a company subject to a tender offer proposal is in a unique position to take steps and make repre-

sentations that may have a significant impact on the likelihood that the proposal will be frustrated. For example, in the instant case, Field's undertook a hasty acquisition program which may have made Field's significantly less attractive and contributed to the withdrawal of the proposal. Admittedly, this was a course of action rather than primarily a course of representation--but the effect of the latter could be the same.

Compelled by the logic of its position that Section 14(e) provides no protection with respect to offers which are withdrawn before stockholders have an opportunity to tender, the majority also concludes that Section 14(e) does not apply to decisions not to sell into markets which are arising on news of a tender offer announcement. But in Gerber v. Berman Products Co., supra, the court said that claims based on the interim market price of stock were actionable even where a proposed tender offer is withdrawn without becoming effective:

> The requisite causation does exist, however, to the extent that [shareholders] were misled into retaining their holdings when they could have sold them on the market at a higher price. The legislative history of the Williams Act indicates that the legislation was intended to reach such transactions as well as those involving the actual tender of a stockholder's shares.... If [the board of

> directors misrepresented or omitted material facts in connection with their opposition to the [tender offer] proposal so that [the shareholders] were induced to retain their shares in reliance upon the integrity and good judgment of the board of directors, but had they known the truth they would have sold their stock in the rising market, a direct causative link exists between [the board of directors'] acts and [the shareholders'] investment decision.

Berman, 454 F.Supp. at 1325.

The majority places heavy reliance on Lewis v. McGraw, 619 F.2d 192 (2d Cir.)(per curiam), cert. denied, --U.S. --101 S.Ct. 354, 66 L.Ed.2d 214 (1980) where the Court of Appeals for the Second Circuit dismissed the stockholders' Section 14(e) claim for failure to establish reliance or causation. There a tender offer, conditioned on the approval of target management, never became effective because the board of the target corporation rejected the proposal. The district court in Lewis concluded that the complaint sufficiently alleged deception "in connection with the tender offer" because "the prospective offeror [had] made a public announcement of a proposed tender offer and [plaintiff had alleged] a clear and definite intent to make a tender offer." Lewis v. McGraw, [1979-1980 [Transfer Binder] Fed.Sec.L.Rep. (CCH)¶97,195,96,568 (S.D.N.Y.1979). Although the complaint was dismissed for failure to allege causation and reliance, the district court emphasized that "it would be inconsistent with the purpose of Section 14(e) to preclude an action for damages relating to pre-tender offer violations in cases where no tender offer was in fact made. Such [a rule] would have the effect of providing a safe harbor for target companies who were successful in their use of misstatements or deception to discourage the making of tender offers." Id. at 96,568. I find the district court's mode of analysis reflective of the economic realities of the situation and consistent with the thrust of prior case law. See Berman v. Gerber Products Co., supra; Applied Digital Data Systems, Inc. v. Milgo Electronic Corp., 425

F.Supp. 1145 (S.D.N.Y.1977).[34] If, therefore, Lewis is to be construed as the majority would have it here, I am quite unpersuaded by what would seem to be the Second Circuit's unexplained and summary departure from a well-established line of analysis.

But, as the Securities and Exchange Commission in its amicus curiae brief in the instant case points out:

> The Lewis opinion [by the Second Circuit] ... addressed only the question whether protection was afforded against deception that operates to prevent a tender offer from becoming effective and thus deprives shareholders of the opportunity to make a decision whether to tender their shares....

> [T]he Lewis opinion [does not address] the different question presented here, of whether shareholders are afforded protection from deception that influences investment decisions which they do in fact make after a tender offer proposal is publicly announced.

SEC Supplemental Br. at 11-12. This distinction (between loss of the tender offer itself and loss of the opportunity to sell at rising prices induced by the tender offer proposal) is clear and realistic. If there was deception in the present case, then many Field's shareholders could have failed to sell their stock at the high prices induced by the tender offer announcement because they were deceived. From the perspective of a public shareholder, once announcement of a tender offer proposal is made, it matters little whether fraud occurs before or after shareholders are given the opportunity to tender to the bidder, or whether they are ever given that opportunity. A shareholder, who, in the fact of a proposed tender offer elects not to sell into the market in reliance on management's misleading statements, is in a position similar to that of a shareholder who elects not to tender to the bidder in reliance upon such statements. Congress clearly protected the latter, as well as, I believe, the former.

IV.

Without attempting to analyze all the statements alleged in this case to be false or misleading, I address only the letter from Field's president to its shareholders dated December 20, 1977. In this letter the president reported consolidated net earnings for nine months ended October 21 to be up 13% without adverting in any way to his expectation (evidenced in a five-year plan just submitted to the Board) that consolidated net earnings for the year would decline by 6-1/2%. Thus it was fully expected that there would be a drop in annual earnings from $2.01 to $1.86 per share. In fact, earnings for the year turned out to be $1.76 (down 25%). Having disseminated glowing generalities about the future, citing interim financial figures, defendants had the duty to disclose the anticipated though unpleasant, immediate expectations of management. See First Virginia Bankshares v. Benson, 559 F.2d 1307, 1314 (5th Cir. 1977), cert. denied, 435 U.S. 952, 98 S.Ct. 1580, 55 L.Ed. 2d 802 (1979). The majority finds this very questionable communication to be so far from deceptive or misleading as not to require its submission to the jury.

By way of defending its conclusion, the majority argues that it was clear from the context of the letter that unprofitable ventures would turn the year-to-year comparison distinctly unfavorable. Maj. op. ante at 291-292, note 5. I think it just as rational to interpret the letter as saying that, but for the sour undertakings, the nine-month numbers would be even better. The majority also defends its conclusions by arguing that, since the internal estimates were not precise, it was better to leave the public with an upbeat nine-month impression than to suggest that the full year would be down, although no one knew exactly how much. Maj. op. ante at 292-293. But this defense ignores the fact that management's pitch to the shareholders was bolstered by three-quarter figures which the managers then believed to be unrepresentative of the full year. Whatever may have been management's (perhaps perennial) hope that "there [was] light at the end of the earnings' tunnel" (maj. op. ante at 291-292, note 5), this misleading use of the numbers created a serious question for the jury.

V.

To have taken this close case presenting a wide range of defensible inferences from the jury is a major disservice to stockholders everywhere. This case announces to stockholders (if they did not know it before) that they are on their own and may expect little consideration and less enlightenment from their board of directors when a tender offeror appears to challenge the directors for control. I believe that only the submission to jury verdict of cases like this one can restore confidence in our system of corporate governance. While I concur as to many of the Securities Act deception claims, I must respectfully dissent in the areas which I have indicated.

MAJORITY
FOOTNOTES

1. The plaintiffs also allege a violation of § 14(e) of the Act, 15 U.S.C. § 78n(d) (1976), apparently on the theory that conduct which violates § 14(e) derivatively breaches § 14(e)(4), which provides:

> (4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commissions may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The plaintiffs have not briefed any independent grounds upon which a § 14(d) violation could be premised. Therefore, and in light of our ruling on the plaintiffs' § 14(e) claims, we affirm the district courts ruling as § 14(d) as well.

2. Section 14(e) provides:

> (e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive,or manipulative acts or practices, in connection with any tender offer or

> request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

3. Our review here follows the order in which the issues were presented to this court, and deals with the federal claims first. Thus while we recognize here that the plaintiffs' allegations may state a claim for breach of fiduciary duty under state corporation law, there was a failure of proof to support these allegations, we will be demonstrated hereinafter. See, STATE LAW CLAIMS, infra.

4. The opinion of the district court has thoroughly disposed of any contention that the defendants' directors engaged in any manipulative conduct within the scope of the Act, and we adopt its reasoning to that extent.

5. The relevant portions of that letter stated:

> A number of programs to improve our profitability and expand our profit base were initiated before I came here, and others have been started since I arrived. These include:

- Modernization and expansion of many of our stores
- Revitalization of our merchandising programs
- Analysis of further opportunities in new store locations and new market areas
- Disposition of unprofitable interests in real estate and hotel ventures

Even at this early date, these programs are having positive effect. For example, we have disposed of most of our interest in The Ritz-Carlton hotel. This has eliminated a significant drain on our earnings. The revitalized merchandising programs are generating increased sales.

- For the nine months ended October 31, income before ventures and taxes was up 24.4% and consolidated net income was up 13%.
- Sales showed a gain of 9.4%, virtually all from comparable stores open both years.

We limit our discussion to whether omission of the projections made the letter misleading because we find that no rational juror could find it deceptive on its face. The sentences immediately preceding those cited by the plaintiffs make it absolutely clear that Field's earnings would be adversely affected in that fiscal year by the unprofitable ventures. The thrust of the letter is that there is light at the end of the earnings tunnel, not that this will be a banner year for Field's earnings.

6. The trial court also excluded the plaintiffs' proffered expert testimony on the ordinary standards against which the actions of boards of directors and investment bankers would be measured. The trial court ruled that such evidence would impinge on the function of the trial court, and furthermore, as to the investment bankers, was irrelevant to the issue of the directors' liability.

The standard of review in considering the admission of expert testimony is whether the trial court judge's exclusionary ruling was clearly erroneous. Karp v. Cooley, 493 F.2d 408, 424(5th Cir. 1974). Viewing the testimony in this light, we affirm the district court's ruling. In Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 509-10 (2d Cir.), cert. denied, 434 U.S. 861 (1977), the court cautioned against the danger of letting experts in a securities case usurp the function of the judge, stating, "It is not for witnesses to instruct the jury as to applicable principles of law, but the judge." The expert would have been able to add nothing to the formulation of the proper standards for evaluating the conduct of Field's directors enunciated by the trial court. We also agree with the trial court that testimony on how the investment bankers should have responded to the CHH proposal is irrelevant to this case, in which it is the conduct of the directors that is the issue.

7. We are not persuaded by the dissent's attempts to distinguish the line of cases culminating in Crouse-Hinds. We believe the Crouse-Hinds court, in reversing an interpretation of Treadway similar to that espoused by the dissent, foreclosed that construction of the business judgment rule. It found that allegations of intent to retain control were insufficient as a matter of law even to raise a sufficiently serious question to make a fair ground for litigation. As the Trueblood court concluded, "at a minimum, the Delaware cases require that the plaintiff must show some sort of bad faith on the part of the defendant....We do not think that a showing of 'a' motive to retain control, without more, constitutes bad faith in this context unless we are to ignore the realities of corporate life." 629 F.2d at 293. Because our examination of the board's conduct does not reveal such bad faith, we do not believe an evaluation of the fairness or wisdom of the board's conduct is called for as long as it can be attributed to any rational business purpose.

Nor are we persuaded by the dissent's reliance on Klaus v. Hi-Shear, 528 F.2d 225 (9th Cir. 1975), and Royal Indus., Inc. v. Monogram Indus., Inc., [1976-77 Transfer Binder] Fed. Sec. L.Rep. (CCH) ¶95,863 (C.D.Cal. 1976), both of which apply California corporate law. We note as a general matter that California law seems to impose a higher standard of fiduciary care that does the law of Delaware, which is applicable here.

Compare, e.g., Sinclair Oil Corp. v. Levien, 280 A.2d 717(Del. 1971) (absent proof of self-dealing, fraud, or "gross and palpable overreaching," courts will not examine the intrinsic fairness of the majority's control of the corporation even if it is to the detriment of the minority) with Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 81 Cal. Rptr. 592,600 (1969) (majority has a fiduciary duty to minority, and transactions involving control will be examined under "a comprehensive rule of 'inherent fairness from the viewpoint of the corporation and those interested therein.'"). See 59 Cal. L. Rev. 167, 180(1971); 7 Pac. L. Rev. 613, 617-19 (1976).

8. The trial court judge limited admission of evidence on these pre-CHH takeover approaches to "documents that show statements made at the Board of Directors' meetings, [and] letters written by the defendants as to those." It excluded other evidence as to the transactions, stating, "to go through these individual transactions would require an inquiry into who made it, the circumstances of it being made, what were the economic circumstances at the time, what was the financial stability of those who made it, and what were the motives and purposes of those who made it. That will extend this record unnecessarily....[T]o go into these individual transactions would go afield into all matters which would be totally collateral." Questions of admissibility of evidence of prior acts are peculiarly within the province of the trial court. See, e.g., United States v. Czarnecki, 552 F.2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977). Particularly when admission of

the challenged evidence is likely to be cumulative and confusing, we will not overturn the sound exercise of the trial court's discretion. Furthermore, the plaintiff was not prejudiced by this ruling because the trial court judge saw all the evidence in offers of proof before ruling that there was no issue of fact on which the jury could rule.

The court also excluded hypothetical questions based on the existence of a policy of resistance. Again, this determination was within the broad discretion of the trial court. When a hypothetical question is not supported by independent evidence it is subject to objection. Grand Island Grain Co. v. Roush Mobile Home Sales, Inc., 391 F.2d 35, 40-41 (8th Cir. 1968). Such a question is particularly harmful where it assumes that very wrongful conduct which is the central issue of the plaintiffs' case, and the trial court acted properly in excluding it.

9. It was therefore appropriate for the trial court to exclude as irrelevant evidence offered to show financial details of Field's negotiations with Homart Corporation regarding possible entry into Northbrook Court, and details of Field's lease negotiations with the owners of the Galleria in Houston.

10. Delaware courts hold that the law of the place of the tort governs in actions for interference with a prospective economic advantage. Bowl-Mor Co. v. Brunswick Corp., 297 A.2d 61, 64 n.2

(Del. Ch. 1972). We therefore look to Illinois law in determining whether the plaintiffs have fulfilled the elements of a cause of action. We note that the substantive law of Delaware and Illinois are at any rate the same in actions for interference with a prospective economic advantage. See DeBonaventura v. Nationwide Mutual Ins. Co., 419 A.2d 492, 497 (Del. Ch. 1980); Bowl-Mor Co. v. Brunswick Corp., supra.

DISSENTING

FOOTNOTES

1. Hostile tender offers unavoidably create a conflict of interest.... Nearly all directors and managers are interested in maintaining their compensation and perquisites.... [A] hostile tender offer unavoidably involves forces tending to shape decisions that are not necessarily for the benefit of all shareholders. As a result a... business judgment approach in hostile tender offer cases is inappropriate.

Gelfond and Sebastian, Reevaluating the Duties of Target Management in the Hostile Tender Offer, 60 B.U.L. Rev. 403, 435-37 (1980)(hereinafter "Gelfond and Sebastian").

2. "In practice [and presumably regardless of its numerical composition], the American corporation's board of directors is largely dominated by the management of the corporation." Gelfond and Sebastian at 436. I recognize, however, that plaintiffs here have not sought to prove that management "controlled" the Board. Appellee's Br. at 78.

3. In Mite Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), this court invalidated a provision of the Illinois Business Take-Over Act, Ill. Rev. Stat. ch. 121 1/2, §137.51 et seq. (1979), which provided for a hearing on the equity of a tender offer by the Illinois Secretary of State at the request of "a majority of the directors of the target company who [were] not officers or employees of the target company..." We there said that

this provision was apparently not intended to give incumbent management the right to require hearings. Nonetheless, we said of this procedure that, "It still seems likely that in a significant number of cases management will be able to use the provision...through its ability to influence outside directors." Mite, 633 F.2d at 494-95.

4. Apart, of course, from the very substantial salaries of the "inside" (management) directors and the benefits to certain outside directors, noted supra, all the outside directors had annual incomes from Field's which ranged from $11,200 to $16,000 in 1977. Plaintiffs' Exhibit 437.

5. The suit, initially filed by Crouse-Hinds, alleged that InterNorth had violated New York business corporation law and federal securities law and sought a injunction preventing InterNorth from acquiring Crouse-Hinds stock. InterNorth counterclaimed arguing that the "Exchange Offer" which facilitated the merger of Crouse-Hinds and Belden lacked a legitimate business purpose and was unfair to Crouse-Hinds' stockholders. InterNorth sought to enjoin Crouse-Hinds from purchasing Belden stock. The district court subsequently denied Crouse-Hinds' motion to dismiss the counterclaim and granted InterNorth's request for a preliminary injunction. The Court of Appeals for the Second Circuit reversed.

6. The court affirmed the "normal requirement that a complaining shareholder present evidence of the director's interest in order to shift the burden of proof," but rejected the logic of the district court's conclusion that "if the directors are to remain on the board after the merger, perpetuation of their control must be presumed to be their motivation." Crouse-Hinds, 634 F.2d at 702. To the extent that this language may have been intended to prevent a shift in the burden of proof upon a showing that the directors of a target corporation had an interest in maintaining their control of the corporation, I reject the holding as inconsistent with apposite case low, corporate reality and sound public policy. I do not believe, however, that the Second Circuit intended to establish a rule which would preclude an examination of fairness in the instant case. The facts in Crouse-Hinds are complicated and special, and the Second Circuit summed up its holding by saying: "In short, when the tender offeror has presented the target company with an obvious reason to oppose the tender offer, the offeror cannot, on the theory that the target's management opposes the offer for some other, unstated, improper purpose, obtain an injunction against the opposition without presenting strong evidence to support its theory." Id. at 704 (emphasis supplied). In the instant case, CHH did not present Field's

with an "obvious reason" to oppose the tender offer nor are there alternative reasons "unstated" by plaintiffs here. Further, the Crouse-Hinds opinion recites a number of reasons why the InterNorth tender offer might have been inadequate on the merits, including the fact that the offering price was only $40 per share against a closing price the day before the announcement of $38 per share. Id. at 649 n.5. When examined from these perspectives, the Second Circuit's digression into the principles of logic does not negate the interpretation of the business judgment rule advocated here.

7. Since InterNorth sought injunctive relief, the court was only required to evaluate the likelihood of success on the merits or the existence of a sufficiently serious question going to the merits to make it a fair ground for litigation. Crouse-Hinds, 634 F.2d at 701.

8. Treadway initially filed the action against Care and Daniel Cowin, Treadway's financial consultant. The complaint alleged that Care and Cowin had unlawfully conspired to seize control of Treadway and sought an order divesting Care of its stock and requiring all defendants to account to Treadway for their profits. Care then counterclaimed seeking an injunction to prevent the issuance and sale of 230,000 Treadway shares to a third company, Fair Lanes.

Care claimed that the Treadway Board had breached its fiduciary duty to the shareholders because the sale had been approved primarily to perpetuate the Treadway Board's control of the corporation.

> 9. Nothing in Bennett [v. Propp, 41 Del. Ch. 14, 187 A.2d 405 (1962)] or Cheff [v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964)] suggests that the plaintiff must first prove that the sole or primary purpose of the transaction was the directors' desire to retain control over the corporation. Rather, the unequivocal thrust of Bennett is that once the record demonstrates that control is implicated in the transaction, a conflict of interest is *ipso facto* created. Once a conflict of interest is present, the burden of proof is shifted logically and pragmatically on the defendants 'to justify [the transaction] as one primarily in the corporate interest.' Bennett, *supra*, 187 A.2d at 409.
>
> ...Recent Delaware cases reveal a growing trend to impose obligations on management to justify control-related transactions. Cf. Singer v. Magnavox, 380 A.2d 969 (Del. 1977)...Sinclair Oil v. Levien, 280 A.2d 717, 720 (Del. 1971)...Petty v. Penntech Papers, Inc., 347 A.2d 140, 143 (Del. Ch. 1975).

Trueblood, 629 F.2d at 300-01 (Rosenn, J., dissenting).

10. Another case which figures prominently in the majority's discussion of the Delaware business judgment rule is GM Sub Corp. v. Liggett Group, Inc., No. 6155 (Del. Ch. April 25, 1980). Except for the fact that this unpublished preliminary ruling by a Delaware trial court makes a passing reference to the district court opinion in the instant case, GM Sub Corp. has little relevance to the claims of Field's shareholders.

11. Flom testified that he advised every Field's Chief Executive from 1970 to 1977 that acquisitions were the best means to prevent takeover. Panter, 486 F. Supp. at 1176.

12. Much of the documentary evidence relating to merger or tender offer proposals prior to the CHH offer was excluded by the district court on relevance grounds. Rule 401 of the Federal Rules of Evidence defines relevant evidence as anything which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Plaintiffs here sought to establish the existence of a fixed and pervasive policy of independence which prompted the board to actively resist any CHH proposal regardless of its merit. I believe Judge Will, who made several preliminary rulings in this case, correctly defined the parameters of relevant issues for trial when he said, "...the world didn't start on October 12, 1977[the day CHH first expressed an interest in Field's]. The only way to interprete [sic] what happened from

October 12, 1977 to February ...22nd, when the [CHH] offer [was] withdrawn, is to look at what happened before." Hearing of 3/27/79, Record at 10-11 (emphasis added). Far from being irrelevant"collateral" material, much of the excluded evidence discloses facts which tend to make the existence of a policy of independence "more probable...than it would be without [that] evidence," and therefore, was improperly withheld. Even in the absence of this evidence, however, I think the plaintiffs established a sufficient factual basis for a jury determination of the state claims.

13. When asked to examine the antitrust aspects of a Dayton-Hudson/Marshall Field's combination, William Blair & Co., Field's investment banker, could find no competitive overlap between the two retailers. However, in a letter dated August 5, 1976, a Blair representative commented:

> ...it could be that Marshall Field itself has acquisition thoughts which, if consummated, could result in direct overlap or conflict and conceivably could be the basis for anti-competitive considerations. We suggest that your management give careful review to any acquisition thoughts resulting in entry into new markets by Field's. To the extent that such expansion is a real possi-

> bility, it could at some point have a bearing on a consolidation with a company such as Dayton-Hudson.

Plaintiffs' Exhibit 61. This piece of evidence, however, was improperly excluded at trial. See note 12, supra.

14. There seems to be a striking paucity of evidence on how value might have been "diminished by a given offer." For the most part, Field's managed to squelch these offers before their impact on value could be fully appreciated by its stockholders.

15. Field's investment bankers were never asked to evaluate the adequacy or the fairness of the CHH proposal or determine the range for an acceptable offer. Record at 2275-76. The record only shows that Mr. Flom asked whether "it[was] reasonable to assume that if the Marshall Field Board chose to sell the company now, it could expect to attain a higher price than that proposed by CHH? The response was yes; [but] no price was specified." Plaintiffs' Exhibit 122.

16. The investment bankers' "best professional judgment" was that Field's future earnings would rise 15% in 1978 and 12% eacy year thereafter. Plaintiffs' Exhibit 122; Record as 2309-10. However, Field's President Angelo Arena, who had been on the job less than two months, presented a hastily prepared "five-year plan" which projected an

earnings per share increase of 23% for 1978 and approximately 20% for each year thereafter. The plan also showed that Field's management expected the 1977 earnings (year ending January 31, 1978) would be down some 7% from the prior year, but anticipated a five year increase of up to 193% in Field's per share earnings despite the fact that in the prior five years, Field's per share earnings had declined by 20%. Plaintiffs' Exhibits 122, 413E. The Board rejected the bankers' estimates in favor of Arena's five-year plan. Plaintiffs' Exhibit 122; Record at 2314-17.

17. The December 21, 1977, Acquisition Status Report indicates that less than two weeks prior to the meeting with Dillard's shareholders, Field's officers did not even know whether Dillard's was a standard retailer or a discount operation. Plaintiffs' Exhibit 130.

18. The January 4, 1978, letter from a representative of William Blair & Co. to Field's Executive Vice-President stated:

> The most important benefits to Marshall Field & Co. from an all cash transaction are as follows:
>
> The speed of consummation, since the approach will not require the filing of a registration statement and, since it would be a friendly

> offer endorsed by Dillard management, it would not run afoul of anti-takeover laws nor would there be a need for a stockholders meeting by either company.
>
> ***
>
> ...The principal disadvantages of [a tax-free transaction] are the time required to effect the total transaction (registration and stockholders meetings) and the risk of certain Field's stockholders throwing up roadblocks to the transaction....

Plaintiffs' Exhibit 137 (emphasis supplied).

19. Defendants claim that the acquisition of these Liberty House stores was the fruit of a long-standing desire to expand its Seattle-based Frederick and Nelson division. They point to 1975 and 1976 visits to these locations as proof of their good intentions. They conveniently ignore two important facts, however: 1) in 1975 and 1976 when these visits were made, Field's was fighting off takeover attempts by Federated and Dayton-Hudson, respectively; and 2) a December 1, 1977, letter from John Nannes of Skadden, Arps to Joseph DeCoeur of Kirkland & Ellis suggests a Liberty House acquisition would bolster Field's potential competition theory:

> Dear Joe:
>
> The Wall Street Journal reported in November 25, 1977 (page 14, column 6), that Carter Hawley Hale acquired a Liberty House department

> store in San Jose, California from Amfac, Inc. I understand that there are a number of Liberty House department stores in the Pacific Northwest, and this may well bolster our potential competition theory.

Plaintiffs' Exhibit 109. This letter was written before CHH ever made a formal merger proposal which Field's Board could consider.

20. See Record at 668-69.

21. The figures prepared by Field's Vice-President of Corporate Development were rejected by Field's management and replaced with more optimistic estimates dated January 19, 1978, the day of the Board meeting at which the Liberty House acquisition was approved. Cf. Plaintiffs' Exhibit 148 (figures of Vice-President of Corporate Development) with Plaintiffs' Exhibit 151 (figures used in replacement report).

22. In 1975, Field's management decided not to move into Northbrook Court because Field's already had stores nearby at the Old Orchard and Hawthorn shopping centers. Record at 3200-01.

23. The antitrust complaint filed by Field's relied heavily on the competitive overlap between the Neiman-Marcus Northbrook Court store and Field's Chicago stores. Plaintiffs' Exhibit 19B.

24. Record at 1937.

25. Plaintiffs' Exhibit 285.

26. Plaintiffs' Exhibit 290.

27. Field's also announced in February 1978 that it had commenced negotiations for a store in the North Park Mall in Dallas, Texas. Plaintiffs' Exhibit 169. Dallas is the headquarters of CHH's Neiman-Marcus division, and North Park Mall is the site of a Nieman-Marcus store.

28. At one point during the trial, Director William Blair testified that the Board's "top priority" was to help Arena in the transition period following Burnham's death "because without capable management at the top of the company as our Christmas season was starting, we would have been in trouble and the stockholders would have suffered." Record at 3021.

29. The CHH proposal received by the Board on December 12, 1977 stated, "Our counsel have considered the antitrust aspect of the combination. They believe that the proposed transaction would be lawful and we will act on the basis of that advice." Plaintiffs' Exhibit 111.

30. Kirkland & Ellis initiated the FTC investigation, but no formal action or complaint was ever filed against CHH. Plaintiffs' Exhibit 441.

31. Kirkland & Ellis also asked the Illinois Securities Commission ("ISC") to file suit against CHH for violations of the state securities laws. Although Kirkland attorneys prepared a draft complaint and submitted it to the ISC, the Commission refused to take any action. Plaintiffs' Exhibits 196,441.

32. The fair market value of Marshall Field & Co. stock in the period December 1977-February 1978 was $18-20 per share. The actual price of Field's stock on the New York Stock Exchange increased from about $19-20 per share in September 1977 to just under $23 on December 9, 1977. On December 14, 1977, when trading resumed after being suspended in light of the CHH $36 merger announcement, the price of Field's stock jumped to about $32. In the next six weeks the price ranged from the high $20's to the low $30's. After the February 1, 1978, $42 tender offer announcement, the price of Field's stock increased to a high of over $35 and stayed in the high $20's and low $30's until February 22, 1978 when the price plunged to $19 7/8 with the announcement of the withdrawal of CHH's offer. Plaintiffs' Exhibit 510.

33. In the debate on the Senate floor leading to enactment of the federal takeover disclosure statute, Senator Harrison Williams (its author) said:

> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case.

113 Cong. Rec. 854-55 (1967), quoted in Mite, 633 F.2d at 496 n.22.

34. "When...a public announcement of a proposed offer has been made, the very dangers that the Act was intended to guard against come into play, and the application of section ...14(e) is thus appropriate." Applied Digital, 425 F. Supp. at 1155 (footnote omitted).

JUDGMENT-ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 2, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

RUTH PANTER, et al. Plaintiffs-Appellants, Nos. 80-1375 & 80-1389 vs. MARSHALL FIELD & COMPANY, et al. Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 78-C-620 Judge George N. Leighton

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

---

*/ The Honorable Edward Dumbauld, Senior Judge of the United States District Court for Western Pennsylvania, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 6, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. EDWARD DUMBAULD, Senior District Judge*

RUTH PANTER, et al., Plaintiffs-Appellants. Nos. 80-1375, 80-1389 vs. MARSHALL FIELD & CO., et al. Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 78 C 537 George N. Leighton, Judge

On consideration of the petitions for rehearing and suggestions for rehearing en banc filed in the above-entitled cause by Richard Weiss, et al. and Ruth Panter, et al., plaintiffs-appellants, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel** have voted to deny a rehearing. Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* Edward Dumbauld, Senior Judge of the United States District Court for Western Pennsylvania, is sitting by designation.

** Judge Cudahy voted to grant the petition for rehearing.

Opposition

1

No. 81-666

Office - Supreme Court, U.S.
FILED
NOV 3 1981
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1981

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR., Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

SACHNOFF WEAVER & RUBENSTEIN, LTD.
One IBM Plaza
Suite 4700
Chicago, Illinois 60611
(312) 644-2400

COFFIELD UNGARETTI HARRIS & SLAVIN
Three First National Plaza
Suite 3500
Chicago, Illinois 60602
(312) 977-4400

BRYSON P. BURNHAM
(Counsel of Record for Respondents)
CHARLES W. MULANEY, JR.
KELLY R. WELSH
and
HAMMOND E. CHAFFETZ
DONALD G. KEMPF, JR.
Counsel for respondents
Marshall Field & Company,
Angelo R. Arena,
George G. Rinder and
Arthur E. Osborne

LOWELL E. SACHNOFF
MARVIN A. TENENBAUM
JOEL S. FELDMAN
and

MICHAEL W. COFFIELD
DANIEL J. POPE
Counsel for respondents
Jean Allard,
Edward McCormick Blair,
John M. Budd,
Albert B. Dick, III,
Howard M. Packard,
John M. Simpson, and
Harold Byron Smith, Jr.

SORG/CHICAGO U.S.A.

QUESTION PRESENTED

In this case Carter Hawley Hale Stores, Inc., ("CHH") proposed an acquisition of Marshall Field & Co. ("Field's").* Field's Board of Directors was advised by outside legal counsel that the proposed merger would violate the antitrust laws and the Board, relying on that advice, opposed the proposal. This opposition was disclosed in numerous public statements. Thereafter, CHH withdrew its proposal and decided not to make an offer for Field's stock. Petitioners, certain shareholders of Field's, brought this private damage action against Field's and its Board of Directors.

Petitioners alleged that respondents' opposition to the acquisition proposal violated Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), and Delaware state law. At the close of petitioners' case at trial, the district court concluded that petitioners had not presented sufficient evidence to support essential elements of their claims and directed a verdict for respondents. This judgment was affirmed by the court of appeals, with one judge dissenting. Petitioners' petition for rehearing was denied, and no judge, including the dissenting judge from the original panel, requested a vote on petitioners' suggestion that the case be reheard *in banc*.

---

* Pursuant to Sup. Ct. R. 28, Marshall Field & Co. states: Mafco, Inc., a wholly-owned consolidated subsidiary, is a co-venturer in the Marban real estate venture, the Ritz-Carlton Water Tower hotel venture, and the Mezzanine Restaurant venture. There are no other parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

The question presented to this Court is whether, under these factual circumstances, the court of appeals, after the requisite independent review of the record in this case, including 3,524 pages of trial transcript and 246 exhibits, concluded correctly that petitioners failed to prove essential elements of their claims under Section 14(e) and Delaware law and, accordingly, that a directed verdict for respondents was appropriate.

TABLE OF CONTENTS

PAGE

Table of Authorities v

Statement of the Case 1

  Introduction 1

  Background of the Case 4

  Decisions Below 9

Reasons For Denying The Writ 11

  I. The Court of Appeals Correctly Concluded That Petitioners Had Not Presented Sufficient Evidence To Support Their Federal Securities Laws Allegations And That A Directed Verdict Was Appropriate. 11

    A. The court of appeals' ruling that Section 14(e) does not provide a damage remedy for investors if no tender offer is ever made is in conformity with the decisions of other circuits and is correct. 11

    B. The court of appeals' ruling that petitioners' securities laws claims are barred by this Court's decision in *Santa Fe* is in conformity with the decisions of other circuits and is correct. 13

PAGE

C. The court of appeals' ruling that petitioners are not entitled to relief under the federal securities laws because they did not and could not establish the essential elements of reliance and causation is in conformity with the decisions of other circuits and is correct. 17

D. Petitioners' argument regarding "manipulation" is without merit because there was no evidence of manipulation. 20

E. Neither the district court nor the court of appeals applied the Delaware Business Judgment Rule to petitioners' federal securities laws claims. 21

II. The Court of Appeals Correctly Concluded That Petitioners Had Not Presented Sufficient Evidence To Support Their State Law Claims And That A Directed Verdict Was Appropriate. 22

Conclusion 25

TABLE OF AUTHORITIES

Cases

PAGE

Aaron v. *SEC*, 446 U.S. 680 (1980) 12

Alabama Farm Bureau Mutual Gas Co. v. *American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979), *cert. denied*, 449 U.S. 820 (1980) 16

Altman v. *Knight*, 431 F. Supp. 309 (S.D.N.Y. 1977)..15, 17, 19

Berman v. *Gerber Prod. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978) 24

Biesenbach v. *Guenther*, 588 F.2d 400 (3d Cir. 1978) .. 17

Brady v. *Southern Railway*, 320 U.S. 476 (1943) 3

Browning Debenture Holders' Committee v. *DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977) 17

Bucher v. *Shumway*, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,142 (S.D.N.Y. 1979), *aff'd on the opinion below*, 622 F.2d 571 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) 15, 17

Bucher v. *Shumway*, 452 F. Supp. 1288 (S.D.N.Y. 1978) 14

Chemtron Corp. v. *Crane Co.* [1971-72 Trade Cases] (CCH) ¶ 61,717 (N.D. Ill. 1977) 24

Chris-Craft Indus., Inc. v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1972), *cert. denied*, 414 U.S. 910 (1973) 17-18

Chromally American Corp. v. *Sun Chemical Corp.*, 474 F. Supp. 1341 (E.D. Mo.), *aff'd*, 611 F.2d 240 (8th Cir. 1979) 12

Crane Co. v. *Harsco Corp.*, 511 F. Supp. 294 (D. Del. 1981) 13

PAGE

Elco Corp. v. *Microdot, Inc.*, 360 F. Supp. 741 (D. Del. 1973) 24

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 21

Goldberger v. *Baker*, 442 F. Supp. 659 (S.D.N.Y. 1977) 17

Golub v. *PPD Corp.*, 576 F.2d 759 (8th Cir. 1978) 17

Gulf & Western Indus. Inc. v. *The Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1973) 24

Halle & Stieglitz, Filor, Ballard Inc. v. *Empress International, Ltd.*, 442 F. Supp. 217 (D. Del. 1977) 19

Heit v. *Baird*, 567 F.2d 1157 (1st Cir. 1977) 23

Helfant v. *Louisiana & Southern Life Ins. Co.*, 459 F. Supp. 720 (E.D.N.Y. 1978) 15, 17

Hundahl v. *United Benefit Life Ins. Co.*, 465 F. Supp. 1349 (N.D. Tex. 1979) 16, 17, 18, 19

In re Sunshine Mining Company Securities Litigation, 496 F. Supp. 9 (S.D.N.Y. 1979) 15

International Brotherhood of Teamsters v. *Daniel*, 439 U.S. 551 (1979) 12

Kaufman & Broad, Inc. v. *Belzberg*, [1981] Fed. Sec. L. Rep. (CCH) ¶ 97,893 (S.D.N.Y. 1981) 13

Kors v. *Carey*, 39 Del. Ch. 47, 158 A.2d 136 (1960) 24

Lavin v. *Data Systems Analysts, Inc.*, 443 F. Supp. 104 (E.D. Pa. 1977), *aff'd without opinion*, 578 F.2d 1374 (3d Cir. 1978) 17

Lewis v. *McGraw*, 619 F.2d 192 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980) 12, 18

Marshel v. *AFW Fabric Corp.*, 441 F. Supp. 299 (S.D. N.Y. 1977) 15

Northwest Indus. Inc. v. *B.F. Goodrich Co.*, 301 F. Supp. 706 (N.D. Ill. 1969) 24

PAGE

O'Brien v. *Continental Illinois National Bank & Trust Co.*, 593 F.2d 54 (7th Cir. 1979) 16

Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 14

Rediker v. *Geon Indus. Inc.*, 464 F. Supp. 73 (S.D.N.Y. 1977) 17

Rodman v. *Grant Foundation*, 608 F.2d 64 (2d Cir. 1979) 15, 16

Santa Fe Indus. Inc. v. *Green*, 430 U.S. 1 (1977) 15, 16, 17, 21

Selk v. *St. Paul Ammonia Prod., Inc.*, 597 F.2d 635 (8th Cir. 1979) 15, 16

Stromfeld v. *Great Atlantic & Pacific Tea Co.*, 496 F. Supp. 1084 (S.D.N.Y.), *aff'd*, 646 F.2d 563 (2d Cir. 1980) 13

Touche Ross & Co. v. *Redington*, 442 U.S. 560 (1979) .. 12

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 12

Treadway Companies, Inc. v. *Care Corp.*, 638 F.2d 357 (2d Cir. 1980) 19

Tyco Laboratories v. *Kimball*, 444 F. Supp. 292 (E.D. Pa. 1977) 17

Statutes

Securities and Exchange Act of 1934, Section 14(e) *passim*

Congressional Reports And Hearings

Hearings on H.R. 12934 Before a Subcommittee of the Senate Committee on Appropriations, 95th Cong., 2d Sess., pt. 5 at 1963 (1978) 7

Hearings on S. 510 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 33 (1967) 13

113 Cong. Rec. 855-56 (1967) 13

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-666

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR., Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Introduction

This private action* was brought by certain shareholders of Field's against the company and the ten individuals who were its directors between December 12, 1977 and February 22, 1978.* In December, 1977, Field's Board of Directors, comprised primarily of outside, independent directors,** unanimously rejected an acquisition proposal from CHH. This rejection, disclosed immediately by Field's in numerous public statements, was based on the unequivocal advice of outside legal counsel that any merger

---

* The class status of the petitioners is questionable, at best. Nine separate actions originally were before the district court

(footnote continued)

(footnote continued)

and were consolidated for trial. On the eve of trial, plaintiffs in all but the one case now on petition for certiorari moved to decertify petitioners as class representatives and their counsel as class counsel on the grounds that petitioners' counsel "has not prepared a case and he has no evidence to offer. . . ." Tr. 30. While the district court declined to grant this motion, it had entered an order—over petitioners' objection—which expressly provided that the "disposition of claims set forth in the [other] cases shall be binding on all parties in these consolidated cases with the exception of the named plaintiffs in the *Panter* case." Jan. 21, 1980, Order, Leighton, J. In light of this order, two separate appeals from the directed verdict were lodged with the Seventh Circuit. One appeal (No. 80-1389) related solely to the *Panter* case and is the subject of the Petition. The other appeal (No. 80-1375) covered the claims of all parties "with the exception of the named plaintiffs in the *Panter* case." No petition for writ of certiorari was filed by the non-*Panter* class plaintiffs. *Weiss* v. *Marshall Field & Company*, ---- U.S. ----, 50 U.S.L.W. 3277 (Oct. 13, 1981).

* December 12, 1977 is the date CHH (not a party to this litigation) first publicly announced its proposal to merge with Field's; February 22, 1978 is the date CHH announced that it would not proceed with its proposal to make an exchange offer for Field's stock.

** Of the ten members of the Board, seven were outside, independent directors; only three were from Field's management. 646 F.2d at 278, 294 (Pet. App. 130, 215).

between Field's and CHH would violate the antitrust laws and could not be consummated.

Petitioners argue that Field's response to the CHH proposal violated Section 14(e) of the federal securities laws, 15 U.S.C. § 78n(e), and Delaware state law, and that they are entitled to the proceeds of a CHH exchange proposal valued at $42 a share, an offer which CHH proposed to make but never made. After a four-week presentation of petitioners' case, the trial court concluded that "plaintiffs' evidence, considered together with all reasonable inferences favorable to them, totally fails to prove necessary elements of their claims." 486 F. Supp. at 1195 (Pet. App. 120).* Likewise, the court of appeals, after an independent review of the 3,524 pages of trial transcript and 246 exhibits in this case, concluded that the evidence, taken as a whole, did not provide "a sufficient probative basis upon which a jury could reasonably reach a verdict [in favor of plaintiffs] without 'speculation over legally unfounded claims.' *Brady* v. *Southern Railway*, 320 U.S. 476, 480 (1943)." 646 F.2d at 281 (Pet. App. 150).

In reaching this conclusion, both the trial court and the court of appeals correctly applied established federal securities law and Delaware state law to the extensive record. Indeed, petitioners have not identified a single conflict between the decisions of the courts below and any decision of this or any other court. In these circumstances, petitioners have demonstrated no basis to invoke the certiorari jurisdiction of this Court.

---

* The "Pet. App." citations are to the Appendix attached to the Petition for Certiorari ("Pet.").

Background of the Case

The evidence presented during petitioners' case at trial showed the following:

In October, 1977, CHH, a national retailer,* began making informal contacts with various persons to explore the possibility of a merger between CHH and Field's. Tr. 3020. This interest continued through November when representatives of CHH made several phone calls to Field's directors, including the newly elected President of Field's, Angelo R. Arena (formerly Chairman of CHH's Neiman-Marcus division). Early in November, Mr. Arena sought legal advice from the New York law firm of Skadden, Arps, Slate, Meagher & Flom ("Skadden, Arps"), Field's counsel in the areas of corporate acquisitions, securities law, and general corporate law since the late 1960's, and the Chicago law firm of Kirkland & Ellis, Field's counsel on antitrust matters since the early 1970's. Tr. 360, 1111; PX 201; Tr. 397-99, 2058.

Later in November, representatives of Field's and CHH discussed in general terms the possibility of a merger between the two retail companies. On December 2, 1977, Hammond Chaffetz of Kirkland & Ellis told Mr. Arena the results of the firm's antitrust analysis: a merger between Field's and CHH clearly would be illegal under the antitrust laws and could not be accomplished. Tr. 988.

---

* CHH's Neiman-Marcus Division already had entered the Chicago market through internal expansion and, as outlined in CHH's 1976 Annual Report issued just a few months prior to the December, 1977 merger proposal, had plans to expand its Chicago operations. Tr. 1440. As of December 12, 1977, CHH's Chicago operations included a successful Neiman-Marcus store in Northbrook, Illinois (a suburb of Chicago), and a retail site just a block south of Field's major new store on Chicago's near North Side, where CHH expected to open a Neiman-Marcus store. In addition, CHH had been negotiating to open a Neiman-Marcus store near Field's store in Oakbrook (also a suburb of Chicago). CHH also owned and operated, in competition with Field's, the national chain of Walden Book stores with numerous retail outlets in the Chicago area. Tr. 1440-41, 1254.

On Monday morning, December 12, 1977, CHH delivered a letter to Field's directors proposing a merger of CHH and Field's with a negotiating price of cash and CHH stock equivalent to $36 per share of Field's common stock. PX 111. A special Field's Board meeting was held on December 13, 1977, to consider the matter. The meeting began in the afternoon and lasted well into the evening. The entire Field's Board was present as well as lawyers from Kirkland & Ellis and Skadden, Arps, and investment bankers from Smith, Barney, Harris & Upham and Wm. Blair & Co. PX 114.

At this meeting, the Field's Board was advised by Kirkland & Ellis that a merger of Field's and CHH would be illegal and could not be consummated, principally because of: (1) existing competition between Field's Chicago area stores and the store operated by CHH's Neiman-Marcus division in the Northbrook Court shopping center, (2) potential competition between Field's stores and stores which Neiman-Marcus intended to open on North Michigan Avenue and in Oakbrook, and (3) existing competition between the book departments in Field's stores and stores operated by CHH's Walden Books division. Tr. 3077-79. Relying on this advice, the Field's Board unanimously rejected the CHH proposal because it would be illegal, and the Board members ratified the decision to file an antitrust complaint in the United States District Court seeking a prompt ruling on the antitrust issue. PX 114; Tr. 990-91, 3077-87.*

The investment bankers unanimously advised the Board that a higher price than the $36 per share proposed by CHH could be obtained in a sale of Field's. PX 122; Tr. 2418-20. On the basis of this advice, the Field's Board concluded that, apart from the illegality of the proposed combination, the $36 price was inadequate. Tr. 3075. After this meeting, the Field's Board immediately disclosed to the public the basis for its opposition to the CHH proposal, and reiterated the opinion of Field's outside counsel that "the proposed merger is clearly in violation of the United States antitrust laws." PX 123.

On February 1, 1978, CHH filed a registration statement with the SEC and publicly announced that, subject to numerous conditions, it intended to make an exchange offer for Field's stock in which each Field's share could be exchanged for a combination of cash and CHH stock valued by CHH at $42. Significantly, the CHH proposal explicitly was conditioned upon a resolution of the pending antitrust litigation which would not "prevent, restrict or delay completion of the offer, or seriously affect the business and operations, prospects or conditions (financial or otherwise) of Field's or Carter Hawley." Tr. 3207-08; PX 288; Tr. 1383-84, 1386.

---

* Petitioners' criticism of Field's Board for "raising the spectre of antitrust in every aspect of their handling of CHH's approach" and for filing an antitrust lawsuit against CHH is empty rhetoric: petitioners never challenge the validity of the advice of Field's legal counsel that a Field's-CHH merger would have been illegal. Both the trial court and the court of appeals agreed that the antitrust suit was authorized by Field's Board in good faith reliance on the advice of outside, independent counsel, and that the suit was initiated to protect Field's and its shareholders from the damage caused by either a futile effort to merge or a forced divestiture. 646 F.2d at 297-98 (Pet. App. 225-28); 486 F. Supp. 1194 (Pet. App. 116-17).

At a special meeting on February 2, 1978, the Field's Board considered the proposed CHH exchange offer. Mr. Chaffetz of Kirkland & Ellis reviewed the status of the antitrust litigation before District Judge Prentice H. Marshall and informed the Board that the FTC had voted to institute a formal investigation into the legality of a Field's-CHH combination. PX 290; Tr. 1411. After the meeting, the Board issued a press release which stated that Field's "opposition to the take-over bid by Carter Hawley Hale is unchanged. . . . Our independent legai counsel advised us that any combination of these two companies would violate United States antitrust laws, and this matter is now before the Court." PX 161.

Neither CHH nor Field's issued any additional communications regarding the proposed exchange offer until February 22, 1978, when CHH announced that it would not go forward with its proposal. PX 345. Shortly thereafter, Field's antitrust suit against CHH was dismissed as moot, and the FTC's investigation was terminated.*

Petitioners' "Statement of the Case" asserts that Field's 1978 acquisitions in the Pacific Northwest and in Houston were imprudent and designed to create antitrust obstacles to a Field's-CHH merger. The evidence adduced at trial did not support these assertions. Field's had been advised by its outside counsel that it could not buttress its antitrust suit against CHH by expansion or acquisition, and neither Field's expansion of its existing operations in the Pacific Northwest nor its entry into Houston ever was used as support for Field's antitrust suit. Tr. 940-41.

---

* FTC chairman Michael Pertschuk later testified before Congress that "Carter . . . withdrew its tender offer . . . after we expressed concern about its competitive impact." *Hearings on H.R. 12934 Before a Subcomm. of the Senate Comm. on Appropriations*, 95th Cong., 2d Sess., pt. 5 at 1693 (1978).

Moreover, petitioners' own expert witness testified that Field's interest in expanding its operations in the Pacific Northwest long predated CHH's interest in Field's. Tr. 943, 976, 2007, 1741, 1942. In addition, the financial projections for the acquisition of the stores in the Pacific Northwest showed that Field's would gain significant profits from the acquisition. Tr. 688. Similarly, Field's other expansion in early 1978, into the Galleria shopping center in Houston, was based on plans to expand into Houston and the Southwest which existed long before CHH's approach to Field's. This expansion was supported by favorable market studies and was deemed by petitioners' own expert witness as "a natural expansion" and "logical for the company." Tr. 1750, 1922. As the court of appeals concluded, "the plaintiffs have brought forth no evidence of bad faith. . . . On the contrary, there was uncontroverted evidence that such expansion was reasonable and natural." 646 F.2d at 297 (Pet. App. 224-25).*

---

* Similarly, petitioners assert that since 1967 Field's had a policy, "faithfully followed," to "resist all takeover attempts." (Pet. 6). Petitioners' page references to the record and to the district court opinion do not support this assertion. In fact, prior to the CHH approach in 1977, no tender offer ever had been proposed for the acquisition of Field's. Regarding several informal inquiries made by companies expressing interest in acquiring Field's, both the trial court and the court of appeals found:

> All that the plaintiffs' evidence . . . establishes is that Field's directors evaluated the merits of each approach made. . . .

646 F.2d at 296 (Pet. App. 221-22). *See also* 486 F. Supp. at 1193 (Pet. App. 112-13).

Decisions Below

The district court, after a four week presentation of petitioners' case at trial, concluded that petitioners had failed to prove necessary elements of their federal securities laws and state law claims and that no reasonable jury could arrive at a verdict for petitioners. 486 F. Supp. at 1195 (Pet. App. 120).

The court of appeals, after the requisite independent review of the entire record, stated:

> We therefore conclude, as did the district court, that the plaintiffs have failed to provide a sufficient evidentiary basis on which reasonable jurors could find violations of either the federal securities laws, or state law.

646 F.2d at 299 (Pet. App. 234). Petitioners' petition for rehearing was denied, and no judge, including the dissenting judge from the original panel, requested a vote on petitioners' suggestion that the case be reheard *in banc*. (Pet. App. 320-21).

There was little disagreement in the courts below regarding the disposition of petitioners' federal securities laws claims. The district court and the court of appeals panel unanimously concluded that virtually all of the securities laws claims were defective under this Court's holding in *Santa Fe Indus. Inc.* v. *Green*, 430 U.S. 462 (1977), because, as even the dissenting judge stated, these claims "represent impermissible transmutations of claims for breach of fiduciary duty into federal securities violations." 646 F.2d at 299 (Pet. App. 236) (dissenting opinion).* The disagreement on the court of appeals panel focused not on the federal securities laws claims, but on the disposition of petitioners' state law claims. 646 F.2d at 304-05 (Pet. App. 260) (dissenting opinion). The Petition, however, does not make any argument contesting the court of appeals' disposition of the state law claims.

---

* The dissenting judge identified only a single statement by Field's which he believed raised a potential securities law claim worthy of submission to the jury. 646 F.2d at 299 (Pet. App. 236). This argument properly was rejected by the panel majority. 646 F.2d at 291-93 (Pet. App. 202-07).

REASONS FOR DENYING THE WRIT

This case is devoid of any unusual or novel legal issues. Indeed, petitioners identify not a single conflict regarding any substantive legal issue between the decision in this case and any prior decision of this or any other court. The essence of petitioners' argument is the same as that rejected by this Court in *Santa Fe:* that alleged acts of corporate mismanagement, even though done openly and fully disclosed, raise claims under the disclosure provisions of the federal securities laws. Petitioners never address *Santa Fe,* and rely instead on generalities about the federal securities laws that fail to question or contradict anything said in the opinions below. In addition, petitioners ignore several other bases for the court of appeals' disposition of their securities laws claims which would preclude submission of these claims to a jury, regardless of the merits of the arguments made in the Petition. Finally, petitioners attack as "error" a proposition that neither court below ever adopted: neither the district court nor the court of appeals applied the Delaware Business Judgment Rule to petitioners' federal securities laws claims.

I. The Court of Appeals Correctly Concluded That Petitioners Had Not Presented Sufficient Evidence To Support Their Federal Securities Laws Allegations And That A Directed Verdict Was Appropriate.

A. The court of appeals' ruling that Section 14(e) does not provide a damage remedy for investors if no tender offer is ever made is in conformity with the decisions of other circuits and is correct.

The court of appeals correctly ruled that Section 14(e) does not provide a damage remedy to shareholders when, as in this case, a tender offer is not made. Petitioners contend otherwise, and assert that Section 14(e) should encompass a damage claim brought by shareholders who never were faced with an opportunity to tender their shares. Petitioners fail to cite any case law to support their proposed expansion of Section 14(e), nor can they.* The court of appeals' ruling, that a prerequisite to a Section 14(e) damage claim is an effective tender offer which presented shareholders with a decision whether to tender their shares, is in complete conformity with other federal court rulings. There is not a hint of conflict among the circuits on this question.

The federal courts uniformly have refused to expand the scope of private damage actions which can be brought under Section 14(e) beyond the class of shareholders faced with an actual decision whether to tender their shares. *See Lewis* v. *McGraw*, 619 F.2d 192 (2d Cir.) (per curiam) (plaintiffs cannot state a claim under the Williams Act when a tender offer is withdrawn before the target shareholders have an opportunity to tender their shares), *cert. denied*, 449 U.S. 951 (1980); *Chromally American Corp.* v. *Sun Chemical Corp.*, 474 F. Supp. 1341, 1345, 1347 (E.D. Mo. 1979) (pressure on shareholders to decide whether to tender shares necessary for Section 14(e) cause of action), *aff'd on other grounds*, 611 F.2d 240 (8th Cir. 1979); *Stromfeld* v. *Great Atlantic & Pacific Tea Co.*, 496 F. Supp. 1084, 1089 (S.D.N.Y.) (Section 14 inapplicable because plaintiffs were "never placed in a position where they were required to respond" to a tender offer), *aff'd*, 646 F.2d 563 (2d Cir. 1980); *Kaufman & Broad, Inc.* v. *Belzberg*, [1981] Fed. Sec. L. Rep. (CCH) ¶97,893, at 90,511 (S.D.N.Y. 1981) (no Section 14 cause of action in the absence of an offer "which, upon acceptance, becomes binding on the offeror"); *Crane Co.* v. *Harsco Corp.*, 511 F. Supp. 294, 302, (D. Del. 1981) ("pressure on shareholders to decide whether to sell is the primary characteristic of a tender offer").

---

* Petitioners' argument relies on the general assertion that the securities acts should be construed broadly. (Pet. 22). However, "generalized references to the 'remedial purposes' of the securities laws will not justify reading a provision more broadly than its language and statutory scheme reasonably permit." *Aaron* v. *SEC*, 466 U.S. 680, 695 (1980). Moreover, this Court has clearly indicated that judicial expansiveness in applying the securities laws is impermissible. *See, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979).

The unanimity of the federal court decisions is not surprising. The legislative history of the Williams Act, which added Section 14(e) to the Securities Exchange Act of 1934, demonstrates that when Congress used the term "tender offer" in Section 14(e), it meant an actual offer to shareholders requiring a shareholder to decide whether to tender his shares. For example, the principal sponsor of the Williams Act emphasized that the purpose of Section 14(e) is to protect shareholders "exposed to a bewildering variety of conflicting appeals and arguments *designed to persuade them either to accept or to reject the tender offer.*"[*] And Manuel Cohen, then Chairman of the SEC, noted that the "bill is designed first, to provide those who receive a tender offer with information adequate to an informed decision whether or not to accept. . . ."[**]

---

[*] 113 Cong. Rec. 855-56 (1967) (emphasis added).

[**] *Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*. 90th Cong., 1st Sess. 33 (1967). *See also id.* at 203, 205 (statement of Chairman Cohen) (bill's purpose is "to assure that public shareholders will be given information adequate for an informed decision when a tender offer is made for the shares of their company"; disclosure needed so shareholder can "make an intelligent decision whether or not to tender his shares").

The court of appeals, after reviewing the legislative history, correctly observed that:

> The legislative history of the Act is replete with indications that Congress intended to protect an investor faced with the pressures generated by the exigencies of the tender offer context, and that the sole purpose of § 14(e) is protection of the investor faced with the decision to tender or retain his shares.

646 F.2d at 285 (Pet. App. 171). This conclusion echoed the decision in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977) (emphasis added), where this Court stated:

> The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors *who are confronted with a tender offer.* As we stated in *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. at 58: The purpose of the Williams Act is to insure that public shareholders *who are confronted by a cash tender offer* for their stock will not be required to respond without adequate information. . . .

See also id. at 35-36; *Bucher* v. *Shumway*, 452 F. Supp. 1288, 1294 (S.D.N.Y. 1978) ("The sole purpose of the Williams Act is to provide information to the investor so that he can make a rational decision whether or not to tender all or a part of his shares.").

Given this legislative history, the Seventh Circuit and the other federal courts that have addressed this issue uniformly have reached the correct and only possible conclusion: a private damage action under Section 14(e) will not be implied where, as here, there never was a tender offer requiring a shareholder decision whether to tender shares. Petitioners have offered no legal analysis and certainly no conflicting decisions to contest the correctness of this conclusion or to demonstrate why this conclusion is worthy of review by this Court.

B. The court of appeals' ruling that petitioners' securities laws claims are barred by this Court's decision in Santa Fe is in conformity with the decisions of other circuits and is correct.

The court of appeals, like the district court, correctly ruled that this Court's decision in *Santa Fe Indus. Inc.* v. *Green*, 430 U.S. 462 (1977), precluded petitioners' federal securities laws claims from being submitted to the jury.[*] Petitioners' principal claim is that the Field's Board violated Section 14(e) by opposing the CHH acquisition proposal without a valid business purpose and in breach of its fiduciary duties. But, as this Court ruled in *Santa Fe*, allegations that directors violated their fiduciary duties to stockholders raise issues under state corporate law, not under the federal securities laws. *Id.* at 477, 479-80.[**]

---

[*] This ruling is an independent bar to petitioners' federal securities laws claims; even if petitioners' other arguments to this Court were correct on their merits, petitioners still would not have made a case for reversal of the court of appeals decision because *Santa Fe* would bar their claims. Nevertheless, the Petition never addresses this issue.

[**] The allegations in *Santa Fe* were made under Section 10(b) of the Securities Exchange Act. The courts uniformly have ruled that the principles of *Santa Fe* are fully applicable to actions brought under Section 14. *See, e.g., Bucher* v. *Shumway*, [1979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,299 (S.D.N.Y. 1979), *aff'd on the opinion below*, 622 F.2d 571 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rodman* v. *Grant Foundation*, 608 F.2d 64, 72-73 (2d Cir. 1979); *Selk* v. *St. Paul Ammonia Prod., Inc.*, 597 F.2d 635, 639 (8th Cir. 1979); *In re Sunshine Mining Co. Securities Litigation*, 496 F. Supp. 9 (S.D.N.Y. 1979); *Helfant* v. *Louisiana & Southern Life Ins. Co.*, 459 F. Supp. 720 (E.D.N.Y. 1978); *Marshel* v. *AFW Fabric Corp.*, 441 F. Supp. 299, 300 (S.D.N.Y. 1977); *Altman* v. *Knight*, 431 F. Supp. 309 (S.D.N.Y. 1977). Petitioners never have argued that *Santa Fe* should be limited to actions brought under Section 10(b).

Field's opposition to CHH's proposal was promptly announced and consistently made public throughout the period in question. Field's stockholders were fully aware of the fact that the Board of Directors rejected the CHH proposal, and that it sought, under the antitrust laws, to enjoin CHH from proceeding. There is no evidentiary basis for the argument that petitioners were deceived concerning the material facts of the Field's Board's response to the CHH proposal.

The court of appeals, following *Santa Fe*, reasoned that when:

> the central thrust of a claim or series of claims arises from acts of corporate mismanagement, the claims are not cognizable under federal law. To hold otherwise would be to eviscerate the obvious purpose of the *Santa Fe* decision, and to permit evasion of that decision by artful legal draftsmanship.

646 F.2d at 289 (Pet. App. 190) (*quoting Hundahl* v. *United Benefit Life Insurance Co.*, 465 F. Supp. 1349, 1365-66 (N.D. Tex. 1979)). The court of appeals recognized that petitioners' allegations did not raise valid claims under Section 14(e) and, accordingly, concluded that these claims properly were not submitted to the jury. Petitioners never discuss either *Santa Fe* or the federal cases following it which uniformly have dismissed securities laws claims "in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." *Santa Fe, supra*, 430 U.S. at 477.*

---

* *See, e.g., Rodman* v. *Grant Foundation*, 608 F.2d 64, 72-73 (2d Cir. 1979); *Selk* v. *St. Paul Ammonia Products, Inc.*, 597 F.2d 635, 639 (8th Cir. 1979); *O'Brien* v. *Continental Illinois National Bank & Trust Co.*, 593 F.2d 54, 60 (7th Cir. 1979); *Alabama Farm Bureau Mutual Cas. Co.* v. *American Fidelity Life Ins. Co.*,

(footnote continued)

C. The court of appeals' ruling that petitioners are not entitled to relief under the federal securities laws because they did not and could not establish the essential elements of reliance and causation is in conformity with the decisions of other circuits and is correct.

Even if petitioners could invoke the federal securities laws after *Santa Fe*, they did not raise a jury question because, as the court of appeals concluded, petitioners did not and could not establish the elements of reliance and causation essential to a cause of action under Section 14(e). Again, petitioners fail even to address this dispositive ruling of the court of appeals.

1. Reliance

In order to recover damages under Section 14(e), plaintiffs "must show that there was a misrepresentation upon which . . . [they] relied and that this reliance was in fact the cause of their injury." *Rediker v. Geon Indus., Inc.*, 464 F. Supp. 73, 82 (S.D.N.Y. 1978), *citing Chris-Craft*

(footnote continued)

606 F.2d 602, 610 (5th Cir. 1979), *cert. denied*, 449 U.S. 820 (1980); *Bucher v. Shumway*, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CHH) ¶ 97,142, at 96,299-300 (S.D.N.Y. 1979), *aff'd on the opinion below*, 622 F.2d 572 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *Golub v. PPD Corp.*, 576 F.2d 759, 765 (8th Cir. 1978); *Biesenbach v. Guenther*, 588 F.2d 400, 402 (3d Cir. 1978); *Lavin v. Data Systems Analysts, Inc.*, 443 F. Supp. 104, 107 (E.D. Pa. 1977), *aff'd without opinion*, 578 F.2d 1374 (3d Cir. 1978); *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1084 (2d Cir. 1977); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1364 (N.D. Tex. 1979); *Helfant v. Louisiana & Southern Life Ins. Co.*, 459 F. Supp. 720, 724, 726 (E.D.N.Y. 1978); *Tyco Laboratories, Inc. v. Kimball*, 444 F. Supp. 292, 298 (E.D. Pa. 1977); *Goldberger v. Baker*, 442 F. Supp. 659, 665 (S.D.N.Y. 1977); *Altman v. Knight*, 431 F. Supp. 309, 311, 314 (S.D.N.Y. 1977).

Indus., Inc. v. *Piper Aircraft Corp.*, 480 F.2d 341, 373 (2d Cir. 1972), *cert. denied*, 414 U.S. 910 (1973). *See also Hundahl* v. *United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1369 (N.D. Tex. 1979). Petitioners did not and could not satisfy this requirement in the instant case because CHH withdrew its proposed offer before it became effective.

The court of appeals concluded:

> Because the CHH tender offer was withdrawn before the plaintiffs had the opportunity to decide whether or not to tender their shares, it was impossible for the plaintiffs to rely on any alleged deception in making the decision to tender or not. Because the plaintiffs were never presented with that critical decision and therefore never relied on the defendants' alleged misrepresentations, they fail to establish a vital element of a § 14(e) claim as regards the CHH $42.00 offer.

646 F.2d at 283-84 (Pet. App. 161-161a). In reaching this conclusion, the court of appeals followed the Second Circuit's decision in *Lewis* v. *McGraw*, 619 F.2d 192 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980), a case virtually identical to this one. In *Lewis*, the court held that the plaintiff-shareholders "could not have relied" on the alleged misstatements because the proposed tender offer was withdrawn and the plaintiff-shareholders "were never given an opportunity to tender their shares." *Id.* at 195.

Not only was the requisite reliance for a Section 14(e) claim impossible because no tender offer was ever made, the only evidence regarding reliance was the testimony of stockholders who said that they *did not believe* Field's statements in opposition to CHH's proposal. Tr. 2165, 2249, 2513. These witnesses said that they thought Field's was resisting CHH's offer to force CHH to propose a higher price. Tr. 2261, 2187-88, 2513-14, 3297. Thus, petitioners are in the untenable position of arguing that they were deceived by respondents, although the only testimony at trial came from stockholders who asserted that they never believed what respondents said anyway.

Far from inducing stockholders to buy or hold Field's shares in the midst of the sudden price increases occurring in the market at the time, Field's warned stockholders *against* speculating in Field's shares on the chance that a CHH tender offer proposal would be consummated. PX 429r. Field's knew that CHH's offer was illegal under the antitrust laws and repeatedly reminded the public of this. Petitioners disregarded this advice and continued to hope for a tender offer which never came. They may have made a bad investment decision, but they were not deceived into doing so by respondents.

2. Causation

The court of appeals also correctly ruled that petitioners' Section 14(e) claims could not be submitted to the jury because the evidence adduced at trial demonstrated that these claims lacked the requisite element of causation. 646 F.2d at 285 (Pet. App. 167-68). Under Section 14(e), a plaintiff must demonstrate a causal connection between the defendant's alleged deception and the injuries alleged by the plaintiff. *See, e.g., Treadway Companies, Inc.* v. *Care Corp.*, 638 F.2d 357 (2d Cir. 1980); *Hundahl* v. *United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1369-70 (N.D. Tex. 1979); *Halle & Stieglitz, Filor, Ballard Inc.* v. *Empress International, Ltd.*, 442 F. Supp. 217, 223 (D. Del. 1977); *Altman* v. *Knight*, 431 F. Supp. 309 (S.D.N.Y. 1977).

Petitioners' stated grievance is that they were unable to tender their shares to CHH for $42 a share because of the actions of respondents. Therefore, to recover damages under the federal securities laws, petitioners must prove that respondents' alleged *deception* "caused" CHH not to proceed with a $42 a share exchange offer. In this case, however, there was no proof that any allegedly false statement or omission by Field's caused CHH to withdraw its proposed exchange offer. 646 F.2d at 285 (Pet. App. 167). Thus, because there was no causal link between any alleged deception by respondents and the withdrawal of the proposed exchange offer, petitioners cannot recover for a claimed lost tender offer opportunity under Section 14(e).

In addition, petitioners failed to establish causation with respect to their Section 14(e) and state law claims because they never proved that a tender offer would or could have been consummated had respondents acted other than as they did. If the proposed tender offer would have been enjoined as an antitrust violation in Field's suit against CHH, or as a result of the FTC investigation, then, regardless of the propriety of respondents' conduct, respondents did not legally "cause" petitioners any injury. Petitioners' failed to prove that CHH's tender offer was legal and would have been made and consummated. Thus, there is no substantial evidence to support the essential element of causation. The Petition fails to address either of these causation issues.

D. Petitioners' argument regarding "manipulation" is without merit because there was no evidence of manipulation.

Petitioners' argument regarding manipulation does not provide a reason for this Court to review the instant case. The actions of the Field's Board, even as described in the Petition, do not fall within the scope of "manipulation" under the federal securities laws.* In *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976), this Court defined "manipulation" as,

> virtually a term of art when used in connection with securities markets. It connotes intentional or wilful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.

And, in *Santa Fe*, this Court reiterated that the term "manipulation" is meant to encompass such practices as "wash sales, matched orders, or rigged prices that are intended to mislead investors by artificially affecting market activity." 430 U.S. at 476. There was no evidence adduced at trial suggesting that respondents engaged in any practice even remotely resembling manipulation as that term is defined under the federal securities laws; opposing the CHH acquisition proposal because it violated the antitrust laws certainly does not constitute manipulation. Thus, petitioners' "manipulation" argument does not warrant review of this case by this Court.

E. Neither the district court nor the court of appeals applied the Delaware Business Judgment Rule to petitioners' federal securities laws claims.

Petitioners contend in section three of their Argument that:

> The district court indiscriminately applied the Delaware Business Judgment Rule to Petitioners' federal as well as common law claims. This was error, for the Delaware Business Judgment Rule is not applicable to an action brought under § 14(e).

(Pet. 26). This argument has no basis in the decisions below. Petitioners do not even contend that the court of appeals applied Delaware law to the federal claims and, of course, it did not. The quotation from the district court opinion on which petitioners rely (Pet. 25) is found in "Section III. C." of the district court opinion, entitled "Plaintiffs' State Law Claims." 486 F. Supp. at 1191 (Pet. App. 103). The quotation clearly is in the context of the district court's discussion of the Delaware law applicable to petitioners' state law claims. 486 F. Supp. at 1194 (Pet. App. 117). Petitioners' contention that the district court applied the Delaware Business Judgment Rule to petitioners' federal claims is based on a gross misreading of the district court opinion.[*]

---

* The only "authority" claimed for petitioners' position is an irrelevant decision of this Court from 1880.

II. The Court of Appeals Correctly Concluded That Petitioners Had Not Presented Sufficient Evidence to Support Their State Law Claims And That A Directed Verdict Was Appropriate.

To the extent that petitioners' claims rest on state law, they do not warrant review by this Court. Moreover, the Petition never contests the conclusion of the district court and the court of appeals that petitioners failed at trial to provide a sufficient evidentiary basis on which a reasonable jury could find in their favor on their state law claims. Likewise, petitioners have not asserted any conflict between the decision of the court of appeals and the decision of any other court, state or federal, regarding the disposition of the state law claims. Accordingly, petitioners have completely failed to provide any reason for this Court to exercise its discretion to review these claims.

---

[*] The passage from the opinion of the dissenting court of appeals judge quoted by petitioners (Pet. 27-28) does not suggest that the court of appeals majority applied the Delaware Business Judgment Rule to petitioners' federal securities laws claims and, therefore, is irrelevant to the argument made by petitioners.

The only statement made by petitioners even arguably critical of the court of appeals' disposition of petitioners' state law claims is found in their "Questions Presented." Petitioners ask: "Do directors have the right to aggressively resist tender offers so as to prevent the shareholders from exercising their rights to sell their stock?" (Pet. 1a). This question is then ignored in the body of the Petition which contains neither an explanation of what petitioners' contention means nor any legal analysis regarding the question. Petitioners offer no case law and fail to identify any decisional conflicts regarding the issue.

The record demonstrates that respondents never interfered with any decision by petitioners to sell their stock. Petitioners, like all other Field's shareholders, were free at all times to sell their shares.* Petitioners never were able to sell their shares to CHH simply because CHH never made an offer for the shares.

The decision of the Field's Board to oppose CHH's proposed exchange offer was based on the unequivocal advice of outside counsel that the proposed merger was illegal. The courts, including a Delaware court, uniformly have recognized that a board of directors not only has a right but a duty to oppose an unlawful acquisition attempt like that proposed by CHH. *Heit* v. *Baird*, 567 F.2d 1157, 1161 (1st

---

* Trading in Field's stock temporarily was suspended on the New York Stock Exchange on both December 12 and 13, 1977 at the time of the initial announcement by CHH of its interest in acquiring Field's. Thereafter, during the period up to CHH's withdrawal of its proposed exchange offer, approximately 8,000,000 Field's shares were traded on the New York Stock Exchange; at that time there were approximately 9,000,000 Field's shares outstanding. PX 510.

Cir. 1977); *Berman* v. *Gerber Prod. Co.*, 454 F. Supp. 1310, 1323 (W.D. Mich. 1978); *Chemetron Corp.* v. *Crane Co.*, [1971-72 Trade Cases] (CCH) ¶61,717, at 72,925, 72,933 (N.D. Ill. 1977); *Northwest Indus. Inc.* v. *B.F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969); *Kors* v. *Carey*, 39 Del. Ch. 47, 158 A.2d 136 (1960). The court of appeals recognized that any other rule would be:

> in direct conflict with the duty of directors to evaluate proposed business combinations on their merits and oppose those detrimental to the well-being of the corporation even if that is at the expense of the short term interests of individual shareholders. *See Gulf & Western Industries*, 476 F. 2d at 698; *Elco* v. *Microdot, Inc.*, 360 F. Supp. 741, 754-55 (D. Del. 1973) (if an acquisition would violate the antitrust laws, the interests of shareholders in tendering their shares "must yield," although "barring consummation of this tender offer will deprive these stockholders of their premium," since "this is a premium to which they cannot justly lay claim"); *cf. Kors* v. *Carey*, 158 A.2d 136, 140 (Del. Ch. 1950) (concern with antitrust violations evidences directors' proper discharge of fiduciary duty).

646 F.2d at 299 (Pet. App. 232-33).

The court of appeals found that the decision of the Field's Board to bring an antitrust suit against CHH "clearly served the rational business purpose of protecting Field's from the damage forced divestiture would cause. . . ." 646 F.2d at 297 (Pet. App. 228). After having been advised by outside counsel that a merger with CHH was illegal, it was the responsibility of the Field's Board to oppose the CHH merger proposal. Petitioners have cited no authority from Delaware or any other state to show that this was incorrect as a matter of state law.

CONCLUSION

After a four week presentation of petitioners' case at trial, the district court concluded that petitioners had not presented sufficient evidence to support essential elements of their claims and, accordingly, directed a verdict for respondents. The court of appeals, after the requisite independent review of the record, reached the same result. The decision of the court of appeals is fully in accord with the decisions of this Court and the decisions of other courts of appeals. No basis has been shown for further review of this case by this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MAYER, BROWN & PLATT 231 South LaSalle Street Chicago, Illinois 60604 (312) 782-0600	BRYSON P. BURNHAM (Counsel of Record for Respondents) CHARLES W. MULANEY, JR. KELLY R. WELSH and
KIRKLAND & ELLIS 200 East Randolph Drive Chicago, Illinois 60601 (312) 861-2000	HAMMOND E. CHAFFETZ DONALD G. KEMPF, JR. Counsel for respondents Marshall Field & Company, Angelo R. Arena, George G. Rinder and Arthur E. Osborne
SACHNOFF WEAVER & RUBENSTEIN, LTD. One IBM Plaza Suite 4700 Chicago, Illinois 60611 (312) 644-2400	LOWELL E. SACHNOFF MARVIN A. TENENBAUM JOEL S. FELDMAN and
COFFIELD UNGARETTI HARRIS & SLAVIN Three First National Plaza Suite 3500 Chicago, Illniois 60602 (312) 977-4400	MICHAEL W. COFFIELD DANIEL J. POPE Counsel for respondents Jean Allard, Edward McCormick Blair, John M. Budd, Albert B. Dick, III, Howard M. Packard, John M. Simpson, and Harold Byron Smith, Jr.

Dated: November 4, 1981

Supplemental
Brief

No. 81-666

Office - Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1981

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR., Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

BRYSON P. BURNHAM
(Counsel of Record for Respondents)
CHARLES W. MULANEY, JR.
KELLY R. WELSH
WILLIAM R. KUNKEL
and

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

HAMMOND E. CHAFFETZ
DONALD G. KEMPF, JR.
Counsel for respondents
Marshall Field & Company,
Angelo R. Arena,
George G. Rinder and
Arthur E. Osborne

SACHNOFF WEAVER & RUBENSTEIN, LTD.
One IBM Plaza
Suite 4700
Chicago, Illinois 60611
(312) 644-2400

LOWELL E. SACHNOFF
MARVIN A. TENENBAUM
JOEL S. FELDMAN

and

COFFIELD UNGARETTI HARRIS & SLAVIN
Three First National Plaza
Suite 3500
Chicago, Illniois 60602
(312) 977-4400

MICHAEL W. COFFIELD
DANIEL J. POPE
Counsel for respondents
Jean Allard,
Edward McCormick Blair,
John M. Budd,
Albert B. Dick, III,
Howard M. Packard,
John M. Simpson, and
Harold Byron Smith, Jr.

SORG/CHICAGO U.S.A.

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Introduction 1

I. Response to *Weiss* Respondents' "Statement Of The Case" 3

II. Response to "Argument" of *Weiss* Respondents .. 4

A. The court of appeals' ruling that Section 14(e) does not provide a damage remedy for investors if no tender offer is ever made is in conformity with the decisions of other circuits and is correct. 5

B. The court of appeals' ruling that petitioners had not established a claim under Section 14(e) arising from the nondisclosure of an alleged "policy of independence" is in conformity with the decisions of other circuits and is correct. 6

C. The court of appeals' ruling that the federal standard for a directed verdict requires the court to view all of the evidence in the light most favorable to the appellant is in conformity with the decisions of other circuits and is correct. 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

PAGE

Applied Digital Data Sys., Inc. v. *Milgo Elec. Corp.*, 425 F. Supp. 1145 (S.D.N.Y. 1977) 6

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 6

Boeing Co. v. *Shipman*, 411 F.2d 365 (5th Cir. 1969) 10

California Computer Prod., Inc. v. *International Business Machines Corp.*, 615 F.2d 727 (9th Cir. 1979) 9

Carlson v. *American Safety Equip. Corp.*, 528 F.2d 384 (1st Cir. 1976) 9

Chillicothe Sand & Gravel Co. v. *Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980) 8

Chisholm Bros. Farm Equip. v. *International Harvester Co.*, 498 F.2d 1137 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974) 9

Clark v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974) 9

Coffy v. *Multi-County Narcotics Bureau*, 600 F.2d 570 (6th Cir. 1979) 9

Electronic Specialty Co. v. *International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969) 5

Hannigan v. *Sears, Roebuck & Co.*, 410 F.2d 285 (7th Cir.), *cert. denied*, 396 U.S. 902 9

Iroquois Indus. v. *Syracuse China Corp.*, 417 F.2d 963 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970) 6

Kahan v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970) 6

PAGE

LeClair v. *Saunders*, 627 F.2d 606 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1418 (1981) 9

Lewis v. *McGraw*, 619 F.2d 192 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980) 5

Oldenburg v. *Clark*, 489 F.2d 839 (10th Cir. 1974) 9

Piper v. *Chris-Craft Indus.*, 430 U.S. 1 (1977) 5

Riggs v. *Penn Central R.R.*, 442 F.2d 105 (7th Cir. 1971) 9

Santa Fe Indus. v. *Green*, 430 U.S. 462 (1977) 4, 7

SuperTurf, Inc. v. *Monsanto Co.*, [1981-82] Trade Cases (CCH) ¶ 64,316 (8th Cir. 1981) 9

Tose v. *First Pennsylvania Bank*, 648 F.2d 879 (3d Cir. 1981) 9

Tully v. *Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976) 6

Whiting v. *Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980) 9

Wilkerson v. *McCarthy*, 336 U.S. 53 (1949) 9

William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.*, 652 F.2d 917 (9th Cir. 1981) 9

Wyatt v. *Interstate & Ocean Transp. Co.*, 623 F.2d 888 (4th Cir. 1980) 9

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-666

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR., Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

This supplemental brief is filed on behalf of defendants-appellees in the court below, respondents here, in response to the *"Brief of Additional Respondents In Support Of Petition For Writ of Certiorari Filed Under Rule 19.6"*

(*"Brief of Additional Respondents"*). Respondents received the *Brief of Additional Respondents* after filing the *"Joint Brief Of Respondents In Opposition To Petition For Certiorari"* (*"Joint Brief"*).* In the court below, the now self-styled "Additional Respondents" ("*Weiss* respondents") were plaintiff-appellants in an appeal (No. 80-1375) which was separate from, but argued at the same time as, the appeal of petitioners here ("*Panter* petitioners"; No. 80-1389). Both sets of appellants were unsuccessful in the Seventh Circuit Court of Appeals. Thereafter, *Panter* petitioners timely filed the petition presently before this Court. *Weiss* respondents were late filing a motion to extend time for petitioning for certiorari; thus, they did not file a petition and, instead, filed the *Brief of Additional Respondents.* This *Supplemental Brief of Respondents In Opposition To Petition For Certiorari* is submitted solely to answer several new arguments raised by the *Brief of Additional Respondents.***

---

* Respondents filed a motion to strike the *Brief of Additional Respondents* on November 9, 1981. The motion argued that the brief should be stricken because the "Additional Respondents" are not parties to the action on petition before this Court and their brief was not filed within the time limits set by Sup. Ct. R. 19.6.

** *Weiss* respondents' inclusion of the SEC Memorandum as an "Addendum" to their *Brief of Additional Respondents* seems designed only to circumvent the page limitations imposed by this Court on briefs. There is no Supreme Court Rule regarding appendices or "addenda" which contemplates the inclusion in a brief to this Court of a brief from a lower court containing nothing but argument. Significantly, the SEC recognized that there were numerous bases for the court of appeals' disposition of the securities law allegations in this case and that its differences of opinion with the court of appeals' opinion could be resolved without altering the outcome of the case. *Brief of Additional Respondents* at 3ad-4ad.

I. RESPONSE TO WEISS RESPONDENTS' "STATEMENT OF THE CASE"

Weiss respondents' "Statement of the Case," without a single reference to the record, sets forth a series of self-serving and incorrect allegations lacking any evidentiary support. For example, *Weiss* respondents assert that "Fields' directors had adopted a corporate policy to resist all . . . takeover threats without regard to merit . . . ." *Brief of Additional Respondents* at 1. At trial, however, they failed to prove this. After the requisite independent review of the record in this case, the court of appeals concluded: "The record reveals that appropriate consideration was given to each individual approach made to Marshall Field & Company." 646 F.2d at 296 (Pet. App. 221). *See also* 486 F. Supp. at 1193 (Pet. App. 112-13); *Joint Brief* at 8, fn.

Much of *Weiss* respondents' factual argument criticizes the advice rendered by Field's outside counsel regarding the antitrust implications of the possible mergers contemplated by several informal approaches made to Field's prior to 1977. There is no basis in the record for such criticism. There was evidence that Field's was advised by outside legal counsel that it should consider the antitrust implications of any proposed merger, but it is impossible to conceive how Field's reliance on this sound advice was in any way improper. Indeed, because all these approaches involved national retail organizations like Field's, any other advice would have been irresponsible. Contrary to *Weiss* respondents' unsupported allegations, there was no evidence of Field's creating "antitrust obstacles by expansion or acquisition and then threatening antitrust litigation with the potential acquiring company." *Brief of Additional Respondents* at 2. Finally, and most importantly for purposes of this petition which seeks damages for an alleged lost tender offer opportunity from CHH, *Weiss* respondents, like *Panter* petitioners, never question the legal advice rendered by outside counsel, and relied on by the Field's Board, that a merger between Field's and CHH would have violated the antitrust laws and could not have been consummated.

II. RESPONSE TO "ARGUMENT" OF WEISS RESPONDENTS

Weiss respondents do not present any legal issues worthy of review by this Court. Like *Panter* petitioners, *Weiss* respondents rely on generalities about the securities laws and fail to identify any specific conflict between the court of appeals' disposition of petitioners' Section 14(e) claims and any decision of this or any other court. Also like *Panter* petitioners, *Weiss* respondents ignore their failure to present evidence at trial to establish the elements of reliance and causation essential to petitioners' claims under Section 14(e). *Joint Brief* at 17-20. Moreover, although *Weiss* respondents discuss this Court's decision in *Santa Fe*, they completely ignore the long line of decisions following *Santa Fe* which uniformly have held that allegations of corporate mismanagement, even if disguised by artful legal draftsmanship to appear to be "omissions," "misstatements," or "deception," do not state claims under the federal securities laws. *Joint Brief* at 15-17. The only "conflict" identified by *Weiss* respondents, an argument raised for the first time in their *Brief of Additional Respondents*, focuses on what evidence may be considered by a court to determine whether a directed verdict is appropriate. The cases relied on by *Weiss* respondents to support their supposed conflict are outdated, however, and, in fact, every circuit has adopted the same standard for directed verdict applied by the court of appeals in this case.

A. The court of appeals ruling that Section 14(e) does not provide a damage remedy for investors if no tender offer is ever made is in conformity with the decisions of other circuits and is correct.

The language and legislative history of Section 14(e), and the decisions interpreting it, demonstrate that Section 14(e) does not provide a private damage remedy to shareholders when, as in this case, a tender offer is never made. *See Joint Brief* at 11-14. *Weiss* respondents' argument to the contrary, which relies on general observations about interpreting the securities laws broadly and protecting shareholders prior to the consummation of a tender offer, ignores the distinction under Section 14(e) between preliminary injunctive relief to facilitate a proposed tender offer, and an after-the-fact action for damages when no tender offer actually was made. Although courts, including the courts in the decisions cited by *Weiss* respondents, have been willing to grant preliminary injunctive relief under Section 14(e), they without exception have rejected the notion that a private damage remedy arises where no actual tender offer ever was made and shareholders never faced a decision whether to tender their shares.

This distinction has been recognized by this Court and recently was emphasized by the Second Circuit and by the decision of the court of appeals in this case. In *Piper* v. *Chris-Craft Indus.*, 430 U.S. 1 (1977), this Court held that a defeated tender offeror does not have an implied action for damages under Section 14(e), and referred with approval to Judge Friendly's statement in *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969), that "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given." 430 U.S. at 42. *See also* 646 F.2d at 287 (Pet. App. 178-80). Similarly, in *Lewis* v. *McGraw*, 619 F.2d 192, 195 (2d Cir.), *cert. denied,* 449 U.S. 951 (1980), the Second Circuit held that shareholders have no cause of action for damages under Section 14(e) if no effective tender offer was made to them, but noted that injunctive relief under Section 14(e) "may be available to restrain or correct misleading statements made during the period preceding a tender offer where it appears that such an offer is likely. . . ."* Thus, the courts have recognized that injunctive relief may be available to a shareholder prior to the actual making of a tender offer, but the courts uniformly have rejected the argument that a private damage action arises under Section 14(e) when shareholders never were faced with a decision whether to tender their shares.**

B. The court of appeals' ruling that petitioners had not established a claim under Section 14(e) arising from the nondisclosure of an alleged "policy of independence" is in conformity with the decisions of other circuits and is correct.

Weiss respondents' contention that respondents violated the federal securities laws by not disclosing an alleged "firm corporate policy to reject any and all attempts by other companies to take over Field's, irrespective of the merits of the proposal," *Brief of Additional Respondents* at 15, has neither record nor legal support. Both courts below rejected *Weiss* respondents' unsupported assertion and expressly concluded that all that the evidence showed was that these pre-1977 "attempts . . . to take over Field's" were merely informal proposals and that Field's evaluated in good faith the merits of each. 646 F.2d at 296 (Pet. App. 220-23); 486 F. Supp. at 1193 (Pet. App. 112-13). Thus, the factual predicate for *Weiss* respondents' argument simply does not exist.

---

* In *Applied Digital Data Sys., Inc.* v. *Milgo Elec. Corp.*, 425 F.Supp. 1145 (S.D.N.Y. 1977), decided prior to the Second Circuit's decision in *Lewis*, the plaintiffs sought only preliminary injunctive relief. Nothing in *Applied Digital* suggests that Section 14(e) gives rise to after-the-fact damage claims when no tender offer is made.

** The injunctive-damage distinction also is recognized under Section 10(b) where a plaintiff must have purchased or sold a security to assert a damage claim, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), but need not allege an actual purchase or sale where injunctive relief is sought to prevent a threatened future fraud. *See, e.g., Tully* v. *Mott Supermarkets, Inc.*, 540 F.2d 187, 194-95 (3d Cir. 1976); *Kahan* v. *Rosenstiel*, 424 F.2d 161, 173 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Iroquois Indus.* v. *Syracuse China Corp.*, 417 F.2d 963, 968 (2d Cir. 1969), *cert. denied*, 399 U.S. 909 (1970).

Further, the only alleged securities law violations raised by *Panter* petitioners' complaint and addressed in the *Panter* petition before this Court are claims under Section 14(e); no claim is made under Section 10(b) in the *Panter* complaint or, accordingly, in the petition. Since *Weiss* respondents are not entitled to present questions not raised in the only petition for certiorari filed, Sup. Ct. R. 21.1(a), their Section 10(b) arguments are not properly before the Court.

Weiss respondents' theory that Field's violated Section 14(e) by failing to disclose its opposition to the CHH proposal simply does not make sense. Field's opposition to the CHH merger proposal was promptly and widely disclosed in numerous public statements. Field's stockholders were fully aware that Field's Board of Directors opposed the CHH proposal and that it was suing under the antitrust laws to enjoin CHH from proceeding. There is no evidentiary basis for the argument that any shareholders were deceived concerning the material facts of the Field's Board's response to the CHH proposal. Thus, the Section 14(e) claims are barred by *Santa Fe* because, in essence, they do not complain of any misstatments or omissions, but rather, complain of alleged acts of corporate mismanagement which are governed by state law. *Joint Brief* at 15-16.

C. The court of appeals' ruling that the federal standard for a directed verdict requires the court to view all of the evidence in the light most favorable to the appellant is in conformity with the decisions of other circuits and is correct.

Weiss respondents contend that there is a conflict among the circuits as to whether a court ruling on a motion for a directed verdict should consider all of the evidence presented at trial, or whether the court's review should be limited to the evidence favorable to the nonmoving party. *Weiss* respondents argue that the court of appeals in this case applied the incorrect standard when it considered "*all* of the evidence in the light most favorable to the appellant." 646 F.2d at 281 (*quoting Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 430 (7th Cir. 1980)) (Pet. App. 150).

These arguments are raised for the first time in the *Brief of Additional Respondents*. The *Panter* petition nowhere contested the standard for a directed verdict applied by the court of appeals. *Weiss* respondents' suggestion that its "Restated" Question Presented for Review No. 4, regarding the directed verdict standard, is a "refinement . . . fairly included within the original formulations of the questions" is disingenuous at best. *Brief of Additional Respondents* at i. This issue was not raised in the *Panter* petition and, therefore, cannot be the basis for review by this Court. Sup. Ct. R. 21.1(a).*

Further, the circuit conflict asserted by *Weiss* respondents has dissolved. All the circuits now agree with the Seventh Circuit that a court deciding a motion for a directed verdict should consider *all* of the evidence in the light most favorable to the appellant.* The decisions from the Eighth, Ninth, and Tenth Circuits relied on by *Weiss* respondents have been superseded by decisions in those circuits applying the same standard applied by the court of appeals in this case.** There is no conflict in the circuits and the court of appeals applied the correct standard for a directed verdict.*** There are no grounds for review of this ruling by this Court.

---

* Moreover, *Weiss* respondents themselves acknowledged the validity of the *Chillicothe* standard, followed by the court of appeals in the instant case, when they cited *Chillicothe* as the relevant standard in their brief to the court of appeals. *Brief of Weiss Plaintiff-Appellees* at 7. *Weiss* respondents should not be heard to object now to the very standard they urged be relied upon in the court below.

---

* *See, e.g., Carlson* v. *American Safety Equip. Corp.*, 528 F.2d 384, 385 (1st Cir. 1976); *LeClair* v. *Saunders*, 627 F.2d 606, 610 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1418 (1981); *Tose* v. *First Pennsylvania Bank*, 648 F.2d 879, 883 (3d Cir. 1981); *Wyatt* v. *Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir. 1980); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 123 (5th Cir. 1980); *Coffy* v. *Multi-County Narcotics Bureau*, 600 F.2d 570, 579 (6th Cir. 1979).

** *See, e.g., William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 652 F.2d 917, 930 (9th Cir. 1981); *SuperTurf, Inc.* v. *Monsanto Co.*, [1981-82] Trade Cases ¶ 64,316 at 74,412-13 (8th Cir. 1981); *California Computer Prod., Inc.* v. *International Business Machines Corp.*, 613 F.2d 727, 733 (9th Cir. 1979); *Chisholm Bros. Farm Equip. Co.* v. *International Harvester Co.*, 498 F.2d 1137, 1140 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Oldenburg* v. *Clark*, 489 F.2d 839, 841 (10th Cir. 1974).

Weiss respondents' contention that the court of appeals decision is "a departure from many decisions of its own circuit," *Brief of Additional Respondents at* 19, n.16, likewise is based on outdated cases. Since *Hannigan* v. *Sears, Roebuck & Co.*, 410 F.2d 285, 288 (7th Cir.), *cert. denied*, 396 U.S. 902 (1969), the Seventh Circuit consistently has applied the standard for directed verdict applied by the court of appeals in this case. *See, e.g., Clark* v. *Universal Builders, Inc.*, 501 F.2d 324, 334 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); *Riggs* v. *Penn Central R.R.*, 442 F.2d 105, 106 (7th Cir. 1971).

*** *Weiss* respondents also rely on dicta from *Wilkerson* v. *McCarthy*, 336 U.S. 53 (1949), to support their argument that courts should examine only that evidence which is favorable to the non-

(footnote continued)

III. CONCLUSION

The *Brief of Additional Respondents* has provided no basis for further review of this case by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

BRYSON P. BURNHAM
(Counsel of Record for Respondents)
CHARLES W. MULANEY, JR.
KELLY R. WELSH
WILLIAM R. KUNKEL
and

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

HAMMOND E. CHAFFETZ
DONALD G. KEMPF, JR.
Counsel for respondents
Marshall Field & Company,
Angelo R. Arena,
George G. Rinder and
Arthur E. Osborne

SACHNOFF WEAVER & RUBENSTEIN, LTD.
One IBM Plaza
Suite 4700
Chicago, Illinois 60611
(312) 644-2400

LOWELL E. SACHNOFF
MARVIN A. TENENBAUM
JOEL S. FELDMAN

and

COFFIELD UNGARETTI HARRIS & SLAVIN
Three First National Plaza
Suite 3500
Chicago, Illniois 60602
(312) 977-4400

MICHAEL W. COFFIELD
DANIEL J. POPE
Counsel for respondents
Jean Allard,
Edward McCormick Blair,
John M. Budd,
Albert B. Dick, III,
Howard M. Packard,
John M. Simpson, and
Harold Byron Smith, Jr.

Dated: November 17, 1981

(footnote continued)
moving party. *Brief of Additional Respondents* at 20. The holding of *Wilkerson*, however, is limited to the well-established proposition that a motion for directed verdict should not be granted when the facts regarding a material issue are in conflict. 336 U.S. at 61. Moreover, *Wilkerson* is an FELA case and courts of appeals properly have distinguished it on those grounds. *See, e.g., Boeing Co.* v. *Shipman*, 411 F.2d 365, 372 (5th Cir. 1969). No court of appeals applies the standard urged by *Weiss* respondents.

Opposition

2

Office - Supreme Court, U.S.
FILED
NOV 2 1981

No. 81-666

IN THE

Supreme Court of the United States

October Term, 1981

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KRAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, Each Individually, and on Behalf of the Other Shareholders of Marshall Field & Co.,

Petitioners,

v.

MARSHALL FIELD & COMPANY, ANGELO R. ARENA, GEORGE G. RINGER, ARTHUR E. OSBORNE, JEAN ALLARD, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. BICK, III, HOWARD M. PACKARD, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR.,

Respondents,

and

RICHARD WEISS, ALAN MARKOVITZ, PAUL KREINDLER, DAVID H. GREENSTEIN, RONALD EGNOR, WILLIAM SALTIEL, CLARICE SALTIEL, MICHAEL DeBARTOLO, JOSEPH BERKE, DENNIS SLUSKI, JAMES CADWALLADER, POUZANT HENRY JERYAN, and COLONIAL SECURITIES CORP.,

Additional Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ADDITIONAL RESPONDENTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED UNDER RULE 19.6.

ROBERT S. ATKINS
KENNETH ROSS
FREEMAN, ATKINS & COLEMAN, LTD.
100 W. Monroe Street
Chicago, Illinois 60603

STUART H. SAVETT*
DONALD L. WEINBERG*
DAVID H. WEINSTEIN*
KOHN, SAVETT, MARION & GRAF, P. C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-9900

**Counsel of Record*

Attorneys for Additional Respondents

[Additional counsel listed inside cover]

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

Of Counsel:

Arthur T. Susman
Prins, Flamm & Susman, Ltd.
33 North Dearborn Street
Chicago, Illinois 60602

Harry A. Young
Bilandic, Neistein, Richman,
Hauslinger & Young, Ltd.
33 North LaSalle Street
Chicago, Illinois 60602

Ira B. Rose
Phillips, Nizer, Benjamin,
Krim & Ballon
40 West 57th Street
New York, NY 10019

Mitchell Kramer
Steven Kapustin
Kramer and Salus
1520 Locust Street
Philadelphia, PA 19102

Max Sherman
Dvorkin & Sherman
100 North LaSalle Street
Chicago, Illinois 60602

David Bershad
Milberg, Weiss, Bershad
& Specthrie
One Pennsylvania Plaza
New York, NY 10001

Alan L. Unikel
Rosenberg, Savner & Unikel
10 South LaSalle Street
Chicago, Illinois 60603

Lawrence H. Eiger
Much, Shelist, Freed,
Denenberg, Ament & Eiger
135 South LaSalle Street
Chicago, Illinois 60603

Ben Cohen
High J. Schwartzberg
Schwartzberg, Barnett
& Cohen
11 South LaSalle Street
Chicago, Illinois 60603

Edward Labaton
Stuart D. Wechsler
Kass, Goodkind, Wechsler
& Labaton
122 East 42nd Street
New York, NY 10017

Robert H. Snow
Robert H. Snow, Ltd.
77 West Washington Street
Chicago, Illinois 60602

Sherrie R. Savett
Berger & Montague, P. C.
1622 Locust Street
Philadelphia, PA 19103

RESTATED QUESTIONS PRESENTED FOR REVIEW[1]

1. Are shareholders protected by the Williams Act, Section 14(e) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), during the entire tender offer process, where the announced tender offer is prevented from becoming effective by conduct of the target corporation?

2. Is a corporation's undisclosed "policy of independence," pursuant to which the corporation has unalterably determined to resist all tender offers regardless of their merit, (a) a material fact required to be disclosed by the Williams Act or (b) a fraudulent, deceptive, or manipulative act or practice prohibited thereunder?

3. If so, do the target company and its directors also violate Section 10(b) of the Exchange Act and Rule 10b-5 thereunder?

4. In ruling on a motion for a directed verdict at the conclusion of plaintiffs' case, should a trial court in accordance with the decision of the court below be permitted to consider all evidence introduced, including unfavorable evidence elicited through adverse witnesses, or should a trial court be required to limit its inquiry to evidence favorable to the plaintiff, consistent with decisions of the 8th, 9th and 10th Circuit Courts of Appeal?

---

[1] In support of the Petition for Writ of Certiorari, these additional respondents (see "The Parties," p. ii below) have reformulated the questions as posed in the Petition. These refinements are fairly included within the original formulations of the questions and more clearly set forth the substantial issues which prompted the Securities and Exchange Commission ("SEC") to participate actively as *amicus curiae* in the court below.

THE PARTIES

The parties in the court below include all persons and entities in the consolidated proceedings[2] in the United States Court of Appeals for the Seventh Circuit, Nos. 80-1375 and 80-1389. In addition to the parties identified in the caption to the Petition for Writ of Certiorari, the additional respondents submitting this Statement[3] were appellants below and remain parties herein. Rule 19.6.

---

[2] *Panter v. Marshall Field & Co.*, 646 F. 2d 271, 277 (7th Cir. 1981).

[3] These additional respondents are: Richard Weiss, Alan Markovitz, Paul Kreindler, David H. Greenstein, Ronald Egnor, William Saltiel, Clarice Saltiel, Michael DeBartolo, Joseph Berke, Dennis Sluski, James Cadwallader, Pouzant Henry Jeryan, and Colonial Securities Corp. These plaintiffs brought eight of the nine actions tried together as one consolidated matter, and all such plaintiffs were certified as class representatives.

TABLE OF CONTENTS

Page

RESTATED QUESTIONS PRESENTED FOR REVIEW i

THE PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 5

1. The Williams Act Prohibits Deception During the Entire Tender Offer Process 5
2. The Williams Act Prohibits Fraudulent, Deceptive, and Manipulative Acts and Practices, as Well as Material Misrepresentations and Omissions 9
3. The Secret "Policy of Independence" Is a Material Fact Required to Be Disclosed 12
4. It Was Error for the Court of Appeals to Approve the Trial Court's Consideration of Evidence Unfavorable to Plaintiffs in Ruling on the Motion for Directed Verdict at the Close of Plaintiffs' Case ... 16

CONCLUSION 21

ADDENDUM 1ad

TABLE OF AUTHORITIES

Cases: Page

Aaron v. Securities and Exchange Commission, 446 U. S. 680 (1980) 6
Affiliated Ute Citizens v. United States, 406 U. S. 128 (1972) 6
Applied Digital Data Systems v. Milgo Electronic, 425 F. Supp. 1145 (S. D. N. Y. 1977) 7
Byrne v. Shell Oil Co., 295 F. 2d 797 (7th Cir. 1961) 19
Casko v. Elgin, Joliet and Eastern Railway Company, 361 F. 2d 748 (7th Cir. 1966) 19
Goodman v. Epstein, 582 F. 2d 388 (7th Cir. 1978), cert. denied, 440 U. S. 939 (1979) 6
Gunning v. Cooley, 281 U. S. 90 (1929) 20
Jackson v. Cont. Cas. Co., 266 F. Supp. 782 (S. D. Iowa, 1967), aff'd, 400 F. 2d 285 (8th Cir. 1968) 19
Jiffy Markets, Inc. v. Vogel, 340 F. 2d 495 (8th Cir. 1965) 19
Kingston v. McGrath, 232 F. 2d 495 (9th Cir. 1956) 19
Lohr v. Title, 275 F. 2d 662 (10th Cir. 1960) 19
Lyons v. J. C. Penney Co., 316 F. 2d 753 (7th Cir. 1963) ... 19
Marmo v. Chicago, Rock Island and Pacific Railroad Company, 350 F. 2d 236 (7th Cir. 1965) 19
Olson v. Maxwell, 263 F. 2d 182 (10th Cir. 1959) 19
Panter v. Marshall Field & Co., 486 F. Supp. 1168 (N. D. Ill. 1980), aff'd, 646 F. 2d 271 (7th Cir. 1981) .... *passim*
Piper v. Chris-Craft Industries, Inc., 430 U. S. 1 (1977) 5
Rondeau v. Mosinee Paper Corp., 422 U. S. 49 (1975) 7
Santa Fe Industries, Inc. v. Green, 430 U. S. 462 (1977) 14, 15, 16, 21
Securities and Exchange Commission v. Capital Gains Research Bureau, 375 U. S. 180 (1963) 6
S-G Securities, Inc. v. Fuqua Inv. Co., 466 F. Supp. 1114 (D. Mass. 1978) 6
Simpson v. Skelly Oil Company, 371 F. 2d 563 (8th Cir. 1967) 19

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U. S. 6 (1971) 6

TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438 (1976) 12

Whittington v. Mayberry, 190 F. 2d 703 (10th Cir. 1951) .. 19

Wilkerson v. McCarthy, 336 U. S. 53 (1949) 19, 20

Statutes:

28 U. S. C.:

§ 1331 4

§ 1334 4

§ 1254(1) 1

Securities Exchange Act of 1934:

Section 10(b) ....*passim*

Section 14(a) 12

Section 14(d) 3, 7, 9

Section 14(e) ....*passim*

Section 27 4

Williams Act ....*passim*

Rules:

Rule 10b-5 ....*passim*

Rule 17.1(a) 21

Other Authorities:

Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981) 9

9 Wright & Miller, Federal Practice and Procedure, Section 2529 (1971) 16, 19, 20

OPINIONS BELOW

Panter v. Marshall Field & Co., 486 F. Supp. 1168 (N. D. Ill. 1980), *aff'd*, 646 F. 2d 271 (7th Cir. 1981).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered April 2, 1981. A timely petition for rehearing was denied on July 6, 1981. A timely petition for writ of certiorari was filed on October 5, 1981 and was received by counsel for these additional respondents on October 14, 1981.

The Court has jurisdiction pursuant to 28 U. S. C. § 1254(1).

STATEMENT OF THE CASE

This action arose out of the conduct of Marshall Field & Co. ("Fields") and its directors by which they dissuaded Carter Hawley Hale, Inc. ("Carter Hawley") from effecting a tender offer for Fields stock at $42 per share when the market price of that stock had been only about $20 per share prior to when the Carter Hawley tender offer was proposed.

Even before this proposed tender offer, Fields had long been an attractive candidate for acquisition and vulnerable to uninvited bids for control by other prominent retailers. By 1969, Fields' directors had adopted a corporate policy to resist all such takeover threats without regard to merit (the so-called "policy of independence") but never revealed this key corporate decision.

In December 1969, when faced with takeover interest from another retailer, Fields hired Joseph Flom, one of the premiere anti-takeover counsel in the country. Mr. Flom advised that for Fields to remain "independent" it would have to grow by acquisition in both size and geographic scope because large companies are harder to swallow, acquisitions rid the company of cash which attracts takeovers, and geographical dispersion creates antitrust obstacles to takeover by others in the same industry. Fields followed this advice, and the December 1969 crisis was met by Fields' purchase of an historically unprofitable chain of stores in Ohio and Pennsylvania, directly competitive with its then corporate suitor.

The creation of antitrust obstacles by expansion or acquisition and then threatening antitrust litigation with the potential acquiring company, implemented by preparing complaints, injunction motions, and supporting affidavits, were the hallmarks of Fields' responses to takeover approaches by the largest and most profitable retailing organizations in the nation from 1969 through 1977. When in early 1977, for example, Fields' investment bankers could find no existing overlap in the stores owned by Dayton Hudson, Inc., a retail chain, they suggested to Fields' management that "careful review" be given to "acquisition thoughts which, if consummated, could result in direct overlap or conflict and conceivably could be the basis for anti-competitive considerations."

In view of Fields' "policy of independence" and its standard defense tactics, the October 1977 response to the Carter Hawley approach was virtually inevitable. In October 1977 the Fields' board resolved that any combination with Carter Hawley "should not be considered." Fields' antitakeover lawyers set to work drawing up draft antitrust complaints and injunction motions, and preparing battle-station assignment sheets for personnel of Fields, its counsel, its investment bankers, and other advisors.

The Fields board received only a limited review, and no analysis, of the financial aspects of a formal proposal to negotiate a merger received from Carter Hawley on December 12, 1977. The board immediately rejected 5-year plans of both management and Fields' investment bankers, and accepted in their stead more optimistic 5-year earnings projections which were prepared by new management unfamiliar with the company. This new plan was characterized by the majority below as "hastily updated only the very day of the board meeting" (646 F. 2d at 292) and was used to reject the Carter Hawley proposal. The very next day Fields sued Carter Hawley for attempting a merger which would violate the antitrust laws.

Throughout the period from November 1977 through February 1978, when Carter Hawley attempted to acquire Fields, the defendants issued a stream of letters and press releases[4] and also pursued with frantic vigor a coast-to-coast search for acquisitions, preferably those being immediately available to Fields and which could create antitrust barriers to Carter Hawley. Thus a cash purchase of a chain of stores in Texas and vicinity (the home of Carter Hawley's Neiman Marcus division) was favored for "speed of consummation" because it would not require stockholders' meetings or SEC registration filings, although almost nothing was known about that company. When that deal fell through, Fields settled on the acquisition of a retail chain of five stores of admittedly marginal potential, two of which were characterized by Fields' directors as "dogs" to be disposed of later. This acquisition, which cost Fields $24 million, was approved by Fields' board without even seeing historical financial figures for the five stores, and was followed by announcement of an immediate multi-million dollar, hastily approved expansion of Fields into Texas. This expansion was accomplished by a disadvantageous lease agreed to one day after Carter Hawley announced on February 1, 1978 its $42 per share tender offer for Fields' stock.

---

[4] Fields filed Schedule 14D, pursuant to Section 14(d) of the Exchange Act, with the SEC in December 1977. Periodic amendments were submitted through February 1978.

Although Carter Hawley had filed with the SEC the appropriate documentation for announcement of a tender offer, Fields' acquisition and expansion program ultimately convinced Carter Hawley to abandon its efforts to acquire Fields. Thus, Fields' shareholders were precluded from considering any offer for their stock in a merger or tender offer.

Various complaints were filed by petitioners and these additional respondents on behalf of themselves and all Fields shareholders similarly situated. The plaintiffs included persons who held the Fields stock throughout the relevant time period as well as others who purchased such stock in the open market at various times during that period. The class actions were consolidated for trial.[5]

Although the plaintiffs had introduced evidence of these facts at trial, the district court granted defendants' motion for a directed verdict. 486 F. Supp. 1168. The court of appeals, by a 2 to 1 vote, affirmed over the dissent of Circuit Judge Cudahy. 646 F. 2d 271, 299. Because of the issues of extreme public importance presented in this case, the SEC appeared in the court of appeals as *amicus curiae* in support of petitioners herein and these additional respondents.

Jurisdiction in the district court was properly founded on 28 U. S. C. §§ 1331, 1334, and Section 27 of the Exchange Act, 15 U. S. C. § 78aa.

---

[5] They were also consolidated in the court of appeals. 646 F. 2d at 277.

ARGUMENT

1. The Williams Act Prohibits Deception During the Entire Tender Offer Process.

The Williams Act[6] was intended by Congress to protect the entire investing public—those holding shares of the target company and potential investors in the securities market—from deceptive, misleading, and manipulative acts and practices made by participants in the tender offer process. *Piper v. Chris-Craft Industries, Inc.*, 430 U. S. 1, 32-33 (1977). Despite this clear remedial purpose of the statute, the court below limited application of the Williams Act only to conduct pertaining to a tender offer which has in fact been made effective. In so constricting the statute's application, the court disregarded the broad meaning of the phrase "in connection with" as it pertains to any tender offer, request or invitation for tenders, or solicitation of security holders in regard thereto, and admittedly and unanalytically divined from this Court's decisions a "trend to avoid unduly expansive interpretations of the securities laws . . . ." 646 F. 2d at 286. Yet, the

---

[6] The complete text of Section 14(e) of The Exchange Act is as follows:

> (e) It shall be unlawful for any person to make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Court has advised that Congressional statutes enacted for the protection of investors must be given flexible, not technical constructions broad enough to effectuate the Congressional purpose. *Aaron v. Securities and Exchange Commission,* 446 U. S. 680, 695 (1980); *Affiliated Ute Citizens v. United States,* 406 U. S. 128, 151 (1972); *Superintendent of Insurance v. Bankers Life & Casualty Co.,* 404 U. S. 6, 12-13 (1971); *Securities and Exchange Commission v. Capital Gains Research Bureau,* 375 U. S. 180, 195 (1963). Indeed, in an earlier decision, the court below acknowledged the approach it abandoned in this case:

> The Supreme Court has interpreted the "in connection with" requirement broadly: To be actionable, the deception need only "touch" the transaction complained of. *Superintendent of Insurance v. Bankers Life & Casualty Co., supra,* 404 U. S. 12-13, quoted with approval in *Santa Fe Industries v. Green,* 430 U. S. [462] at 476 [(1977)].

Goodman v. Epstein, 582 F. 2d 388, 410 (7th Cir. 1978), *cert. denied,* 440 U. S. 939 (1979).

Since both Congress and the SEC have left "tender offer" undefined, the relevant inquiry is whether the conduct by Fields "touched" a tender offer, a request or invitation for tenders, or any solicitation in opposition to or in support of such an offer, request, or invitation. By the disjunctive structure of Section 14(e) it is manifest that the statute prohibits fraudulent acts "touching" conduct which is itself not a tender offer, in the traditional sense.[7] Here Fields' defensive tactics "touched" Carter Hawley's announced tender offer, which may certainly be viewed as a solicitation in favor of a tender offer. Similarly, Fields' tactics "touched," or may be viewed as, solicitations in opposition to the announced tender offer.[8]

---

[7] "The statute has been interpreted, however, to embrace securities transactions that do not fall within the traditional definition of a 'tender offer' . . . ." *S-G Securities, Inc. v. Fuqua Inv. Co.,* 466 F. Supp. 1114, 1124 (D. Mass. 1978).

By failing to give the statute this approach, the court below disregarded the primary intent of Congress, in enacting the Williams Act, to protect investors and "the public interest" (Section 14(d)(4) of the Exchange Act), but not to take sides and favor either tender offerors or defending corporate management. As the Court has explained:

> By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts. Indeed, the Act's draftsmen commented upon the "extreme care" which was taken "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."

Rondeau v. Mosinee Paper Corp., 422 U. S. 49, 58-59 (1975).

In *Applied Digital Data Systems v. Milgo Electronic*, 425 F. Supp. 1145, 1153 (S. D. N. Y. 1977), Judge Weinfeld explained why the Williams Act applies throughout the tender offer process, even before the proposed offer becomes effective:

---

[8] Indeed, Fields even submitted its opposition statements to the SEC pursuant to Section 14(d)'s filing requirements.

> There is no apparent reason why any given action may not be taken "in connection with" a development reasonably certain to take place in the future or why a recommendation to reject a proposed tender offer is not also a recommendation to "reject a tender offer." Indeed, Rule 10b-5, which was adopted by the SEC under section 10(b) of the Securities Exchange Act and after which section 14(e) was closely patterned, requires that a complained of action take place "in connection with the purchase or sale of a security," yet it repeatedly has been held to create a cause of action to enjoin purchases or sales of securities that have been proposed but not yet effected. Moreover, to the extent the defendants claim that no pre-offer communications or actions can ever be taken "in connection with" a tender offer, the force of their argument is greatly impaired by a line of cases holding that to be actionable under Rule 10b-5 the fraud must have occurred prior to or contemporaneous with the sale of securities.

(footnotes omitted.)

Similarly, Judge Cudahy in the court below observed:

> From the perspective of a public shareholder, once announcement of a tender offer proposal is made, it matters little whether fraud occurs before or after shareholders are given the opportunity to tender to the bidder, or whether they are ever given that opportunity. A shareholder, who, in the fac[e] of a proposed tender offer elects not to sell into the market in reliance on management's misleading statements, is in a position similar to that of a shareholder who elects not to tender to the bidder in reliance upon such statements. Congress clearly protected the latter, as well as, I believe, the former.

646 F. 2d at 312.

The result reached by the court below flies in the face of this Congressional intent. If not reversed, the decision below unmistakingly tips the balance, in every case where the tender offeror has filed its notices with the SEC and the target management as provided by Section 14(d) of the Exchange Act, decidedly in favor of that management to initiate deceptive and manipulative tactics designed to prevent the investors from taking advantage of a tender offer. The decision, if left standing, would permit a target company to resort to any conduct it selects in order to defeat a proposed tender offer and then escape with no liability under the Williams Act if successful.

In essence, the result below ignores the intended beneficiaries of the Williams Act and adds advance notice of the tender offeror's proposal to the arsenal of weapons available to the entrenched management.[9] Under these circumstances, it is conceivable that investors would be better protected in the absence of the Williams Act, a result which Congress clearly did not intend and which the Court should not countenance.

2. The Williams Act Prohibits Fraudulent, Deceptive, and Manipulative Acts and Practices, as Well as Material Misrepresentations and Omissions.

The court below limited its analysis of the case under the Williams Act only to misrepresentations and omissions bearing directly upon a shareholders' decision whether to accept a tender offer. While the Act certainly prohibits misleading statements during the tender offer process, it also expressly prohibits "fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . ." The Circuit Court unduly restricted application of the Act to the shareholders' "Lost Tender Offer Opportunity" by eliminating fraudulent, deceptive, and manipulative acts and practices from the Act's coverage. The court reasoned with overly simplistic syllogistic logic, as follows:

---

[9] See Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1163 (1981):

> The effect of state and federal regulation [under the Williams Act] of tender offers has been to give the target's management the time to undertake a defensive strategy.

> Because § 14(e) is intended to protect shareholders from making a tender offer decision on inaccurate or inadequate information, among the elements of § 14 (e) plaintiff must establish is "that there was a misrepresentation upon which the target corporation shareholders relied. . . ." Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F. 2d 341, 373 (2d Cir.), cert. denied, 414 U. S. 910, 94 S. Ct. 231, 38 L. Ed. 2d 148 (1973). Because the CHH tender offer was withdrawn before the plaintiffs had the opportunity to decide whether or not to tender their shares, it was impossible for the plaintiffs to rely on any alleged deception in making the decision to tender or not. Because the plaintiffs were never presented with that critical decision and therefore never relied on the defendant's alleged misrepresentations, they fail to establish a vital element of a § 14(e) claim as regards the CHH $42.00 offer.

Panter v. Marshall Field & Co., 646 F. 2d 271, 283-84 (7th Cir. 1981). This narrow, indeed stingy, interpretation of the Act conflicts with the Act's language which is intended to have a remedial application to protect the holders, purchasers, and sellers of publicly traded stock and the fairness of contests for corporate ownership and governance.

The danger this approach poses to the integrity of those markets and to the struggle for corporate control was recognized by both the SEC and Circuit Judge Cudahy in dissent in the court below. Because of the significant impact the decision below may have if not reversed, the SEC filed briefs below as *amicus curiae* and a memorandum in support of petitions for rehearing and suggestions for rehearing *en banc*.[10] The Commission explained:

> When a hostile takeover bid is made, incumbent management and an outsider or minority interest engage in a struggle for corporate control. Tender offer legislation, including the antifraud provisions of Section 14(e) of the Securities Exchange Act, was enacted by Congress to resolve the problems attendant to such contests, without tipping the scales in favor of either side. In the Commission's view, the panel here unduly restricted the protections afforded by such legislation because it erroneously concluded that Congress sought only to protect the right of the shareholders of a company subject to a takeover bid to determine, free of fraud, whether or not to tender. This ultimate decision whether to tender is, without doubt, an important focus of the tender offer process. But, struggles for corporate control are also fought on other fronts. Management may, for example, make statements designed to convince the offeror to withdraw its proposal. Furthermore, statements which affect either the shareholders' ultimate decision whether to tender or the offeror's decision to pursue the tender offer can also have an immediate impact on investment decisions being made in the market. Tender offer legislation protects the subject company's shareholders from fraud in these contexts as well.

Addendum, p. 2ad.

---

[10] A true copy of that memorandum is submitted herewith as an Addendum and incorporated herein by reference as though fully set forth.

Judge Cudahy also concluded that the majority decision

> is a major disservice to stockholders everywhere. This case announces to stockholders (if they did not know it before) that they are on their own and may expect little consideration and less enlightenment from their board of directors when a tender offeror appears to challenge the directors for control. I believe that only the submission to jury verdict of cases like this one can restore confidence in our system of corporate governance.

646 F. 2d at 312.

By failing to apply the Act in a manner consistent with its plain meaning, the court below amputated the statute and disabled shareholders and the SEC from combating obviously deceptive practices which serve no socially or economically useful function but are designed solely to perpetuate existing corporate management.

3. The Secret "Policy of Independence" Is a Material Fact Required to Be Disclosed.

The Court has defined materiality, as it pertains to misrepresented or omitted facts under Section 14(a) of the Exchange Act, in *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1976). There, it was stated that, for purposes of proxy solicitation,

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused

> the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Id., at 449 (footnote omitted).

A comparable definition of materiality applies to nondisclosures under Section 14(e) or Section 10(b). Thus, in the context of Fields' various statements and SEC filings under the Williams Act, the adamant corporate policy actively to resist the acquisition of the company by others would have assumed actual significance to a reasonable investor in, for example, deciding whether to purchase Fields stock in the belief it was undervalued and hence ripe for a takeover bid. Similarly, a reasonable investor would have considered the secret policy, had it been disclosed, as significantly altering the total mix of information available to decide if his investment would bear more fruit if placed in securities other than Fields stock.[11] The

---

[11] Judge Cudahy in the court below recognized the significant impact of the Fields statements upon investor decisions:

> This distinction (between loss of the tender offer itself and loss of the opportunity to sell at rising prices induced by the tender offer proposal) is clear and realistic. If there was deception in the present case, then many Field's shareholders could have failed to sell their stock at the high prices induced by the tender offer announcement because they were deceived.

646 F. 2d 312. In fact, investors testified at the trial that they

policy was, therefore, a material fact under Section 14(e) and Section 10(b) and should have been disclosed in order to prevent Fields' statements of the actions it was taking not misleading.

The court below never evaluated the materiality of this secret policy. It avoided this analysis under Section 14(e) by concluding that the Williams Act does not apply at all. See Point 1 above. And, by misapplying the teaching of *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462 (1977), the court of appeals never addressed the issue under Section 10(b) and Rule 10b-5.

In *Santa Fe*, the Court found that Section 10(b) and Rule 10b-5 did not prohibit a Delaware "short form" merger,[12] although accomplished at an allegedly unfair price, where it was not accompanied by any misrepresentation or deception. Specifically, the Court explained the limited nature of the holding as follows:

> As we have indicated, the case comes to us on the premise that *the complaint failed to allege a material misrepresentation or material failure to disclose*. The finding of the District Court, undisturbed by the Court of Appeals, was that *there was no "omission" or "misstatement"* in the information statement accompanying the notice of merger. On the basis of the information provided, minority shareholders could either accept the price offered or reject it and seek an

---

11. (Cont'd.)

retained their stock during the proposed tender offer but that they would have sold their shares had they known of the policy.

[12] That is, the parent corporation owned at least 90% of the outstanding shares of the subsidiary and was thus authorized under Delaware law to merge with the subsidiary upon decision by the parent's board of directors but without a vote by the minority shareholders of the subsidiary. 430 U. S. at 465.

> appraisal in the Delaware Court of Chancery. Their choice was fairly presented, and they were furnished with all relevant information on which to base their decision.
>
> We therefore find inapposite the cases relied upon by respondents and the court below, in which the breaches of fiduciary duty held violative of Rule 10b-5 included some element of deception.

430 U. S. at 474-475 (italics supplied).

In stark contrast, in this case there were material omissions upon which substantial evidence was introduced, particularly the failure by Fields to disclose that it had a firm corporate policy to reject any and all attempts by other companies to take over Fields, irrespective of the merits of the proposal. To be consistent with *Santa Fe*, therefore, the court below should have addressed, but did not, whether disclosure of the policy was material in the sense that it was "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ." Section 14(e); Rule 10b-5. Instead of this analysis, which is required by the Williams Act, Rule 10b-5, and *Santa Fe*, the court below merely concluded that, since the "policy of independence" might be[13] a breach by Fields' directors of their state law fiduciary duties, the materiality of the omission to disclose that policy was of no concern under the federal law. Worse yet, while *Santa Fe* clearly involved no such deception, the court below incorrectly concluded that "[t]his is precisely the type of claim the Supreme Court intended to bar from the federal forum when it announced the rule in *Santa Fe Industries*." 646 F. 2d at 289.

---

[13] But was concluded not to be.

Clearly, from the plain language of Section 14(e) and Rule 10b-5 and from the manifestly different facts in *Santa Fe*, it was *not* the intention of Congress or the Court to preclude a federal remedy where there has been material deception of investors.

The Petition should therefore be granted to make clear that, to the extent courts have "[i]n the wake of *Santa Fe*" (646 F. 2d at 288) focused their attentions on whether a breach of fiduciary duty is involved, they have misdirected that focus away from the plain language and purpose of the Williams Act and Rule 10b-5.

4. It Was Error for the Court of Appeals to Approve the Trial Court's Consideration of Evidence Unfavorable to Plaintiffs in Ruling on the Motion for Directed Verdict at the Close of Plaintiffs' Case.

There has been significant controvery in the various Circuits as to whether all or only a portion of the evidence introduced during plaintiffs' case should be considered by a trial court in ruling on a motion for a directed verdict. The issue of whether a trial judge should consider all of the evidence presented including unfavorable evidence, or whether analysis should be restricted to the evidence favorable to the party against whom the motion is made, remains unresolved.

As noted by 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, Section 2529, at p. 572 (1971):

> The language of the opinions from the lower courts has been divided. Some of the cases have followed Wilkerson [*Wilkerson v. McCarthy*, 336 U. S. 53 (1949)] and have said that only the evidence favorable to the party against whom the motion is made may be considered. Others say that the court is to consider all the evidence while still others say that

it may look to the favorable evidence and to unfavorable evidence that is uncontradicted and unimpeached.

In the case at bar, the court below concluded that the trial court was correct in taking into account "*all* the evidence," both favorable and unfavorable, in passing on defendants' motion for a directed verdict made at the conclusion of plaintiffs' case. *Panter v. Marshall Field & Co.*, 646 F. 2d at 282. In this connection the court held that "it is not the rule in this circuit that only testimony elicited on direct examination may be considered in a motion for directed verdict" but a court must consider "*all* the evidence in determining whether there is enough to create a jury question." *Id.* at 281-282 (italics original).

Pronouncement of this rule by the court below severely prejudiced plaintiffs by keeping from the jury consideration of their evidence which to a large degree consisted of testimony elicited from officers and directors of Marshall Field called by plaintiffs as adverse witnesses and who presented defendants' side of the case on cross-examination. In sustaining the trial court's granting of defendants' directed verdict motion at the close of plaintiffs' case, the court concluded that in considering all the evidence, together with inferences that could reasonably be drawn therefrom, reasonable people could not differ as to the factual issues presented. Of course, such a decision of necessity required the court to have considered evidence in ruling on the motion elicited on cross-examination from adverse witnesses called by plaintiffs.[14]

---

[14] An example is the testimony on cross-examination of Rinder, Blair, Bowers, and Simpson, all of whom had been called by plaintiffs as adverse witnesses. Rinder, Blair, and Simpson are directors of Marshall Field & Company, and defendants. Bowers was a corporate counsel of Marshall Field & Co. In this connec-

Thus, in misapplying the appropriate standard for ruling on a directed verdict motion, the propriety of the trial court's review of "all the evidence," both favorable and non-favorable, was approved. The effect of this ruling permits the trial court impermissibly to substitute its judgment for that of the jury. Clearly, if the trial court in the instant case had limited the scope of its inquiry to the evidence favorable to plaintiff's case, defendants' directed verdict motion would and should have been denied.[15]

---

14. (Cont'd.)

tion, the court below referred to this testimony of defendant director witnesses (called by plaintiffs during presentation of their case) in order to negate favorable inferences which a jury could otherwise have drawn from such testimony. Thus, while two defendant directors on direct examination admitted to a corporate policy of independence (Tr. 1036-1037), the Court of Appeals noted their equivocal (cross-examination) testimony demonstrated that "neither meant by it resistance at all costs, or against the best interests of the shareholders." *Panter v. Marshall Field*, 646 F. 2d at 296. In contrast, Judge Cudahy, from a review of evidence favorable to plaintiffs, concluded:

> Reviewing first the evidence on the existence of a policy of independence in a light most favorable to appellants, it is difficult to understand the basis for the majority's conclusion that jurors could not fairly and impartially differ as to the inferences to be drawn from the facts presented. See *Hohman*, 471 F. 2d at 820.

646 F. 2d at 305.

[15] Judge Cudahy's strong dissent from the majority opinion vividly illustrates that judges as well as jurors can "differ as to the evidence to be drawn from the facts presented." Based upon a review of the evidence *favorable* to plaintiffs, Judge Cudahy concluded:

> There was abundant evidence from which a jury in this case could have concluded that Field's directors breached their fiduciary duties to the shareholders: 1) by pursuing a fixed, nondebatable and undisclosed policy of massive resistance

The position taken on this issue by the Seventh Circuit is inconsistent with opinions from the Eight, Ninth and Tenth Circuits.[16] In the Tenth Circuit, the rule has long been that "the evidence most favorable to the plaintiff will be taken as true and the unfavorable testimony will be disregarded." *Whittington v. Mayberry*, 190 F. 2d 703, 705 (10th Cir. 1951). Also see *Olson v. Maxwell*, 263 F. 2d 182, 184 (10th Cir. 1959); *Lohr v. Title*, 275 F. 2d 662, 664 (10th Cir. 1960). The Eighth and Ninth Circuits have similarly held that the court should disregard all evidence which is unfavorable to the non-moving party. *Jiffy Markets, Inc. v. Vogel*, 340 F. 2d 495 (8th Cir. 1965); *Jackson v. Cont. Cas. Co.*, 266 F. Supp. 782, 784 (S. D. Iowa, 1967), *aff'd*, 400 F. 2d 285 (8th Cir. 1968); *Simpson v. Skelly Oil Company*, 371 F. 2d 563 (8th Cir. 1967); *Kingston v. McGrath*, 232 F. 2d 495, 497 (9th Cir. 1956).

Although the Supreme Court has long ago enunciated the proper rule to be followed in such cases, there has nevertheless been a great inconsistency among the circuits (WRIGHT & MILLER, *supra*, § 2529). In the case of *Wilker-*

---

15. (Cont'd.)

> to merger with, or acquisition by, a series of the nation's foremost retailers; 2) by making hasty and apparently imprudent defensive acquisitions to reduce Field's attractiveness as a takeover candidate and to force the withdrawal of the CHH offer; and 3) by hastily filing a major antitrust suit to further impair persistent acquisitive efforts of CHH.

646 F. 2d at 305.

[16] The opinion of the court below is also a departure from many decisions of its own circuit. *Byrne v. Shell Oil Co.*, 295 F. 2d 797, 799 (7th Cir. 1961); *Lyons v. J. C. Penney Co.*, 316 F. 2d 753 (7th Cir. 1963); *Marmo v. Chicago, Rock Island and Pacific Railroad Company*, 359 F. 2d 236, 238 (7th Cir. 1965); *Casko v. Elgin, Joliet and Eastern Railway Company*, 361 F. 2d 748, 749 (7th Cir. 1966).

son v. McCarthy, 336 U. S. 53, 57 (1949), the Supreme Court said the following:

> It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.

In light of this decision, courts should uniformly examine only that evidence which is favorable to the nonmoving party in ruling on a motion for a directed verdict. In point of fact, however, some courts have not followed *Wilkerson,* theorizing that because it is a FELA case it cannot state a general rule applicable to all cases. WRIGHT & MILLER, *supra,* § 2529, at p. 572. In fact, *Wilkerson* is consistent with the prior Supreme Court decision in *Gunning v. Cooley,* 281 U. S. 90 (1929).

Thus, although there has already been a determination on this issue by the Supreme Court, what type of evidence is to be considered on a directed verdict motion is still frequent subject of debate. The court in the case at bar chose to consider "all the evidence" before it in passing on the motion, including evidence unfavorable to plaintiffs. Clearly, if the trial court had only been permitted to consider evidence favorable to plaintiffs, defendants' motion would not have been granted.

Plaintiffs respectfully submit that if this Court clarifies the law by requiring courts to limit their inquiry to only favorable evidence in ruling on directed verdict motions, appellate judges as well as litigants are less likely to be "astonished" that a trial judge "could keep [a] case [such as this] from the jury." [17]

---

[17] 646 F. 2d at 309 (Cudahy, J., dissenting).

CONCLUSION

"[B]ecause of the importance of the issue[s] involved to the administration of the federal securities laws,"[18] *Santa Fe Industries, Inc. v. Green,* 430 U. S. at 471, and because of a conflict among the federal courts of appeals concerning the standard for evaluating a motion for directed verdict, Rule 17.1(a), the Petition for Certiorari should be granted and the matter set down for briefing and argument by the parties.

Respectfully submitted,

STUART H. SAVETT *
DONALD L. WEINBERG *
DAVID H. WEINSTEIN *
KOHN, SAVETT, MARION & GRAF, P. C.
1214 IVB Building, 1700 Market Street
Philadelphia, Pennsylvania 19103
(215) 665-9900

ROBERT S. ATKINS
KENNETH ROSS
FREEMAN, ATKINS & COLEMAN, LTD.
100 W. Monroe Street
Chicago, Illinois 60603

Attorneys for Additional Respondents

[Additional counsel listed on page 22]

* *Counsel of Record*

---

[18] The SEC's participation as *amicus curiae* below is very strong indication of such importance. In addition, the topic was treated in the lead article of a very recent edition of the Harvard Law Review. See footnote 9, p. 9 above.

Of Counsel:

Arthur T. Susman
Prins, Flamm & Susman, Ltd.
33 North Dearborn Street
Chicago, Illinois 60602

Harry A. Young
Bilandic, Neistein, Richman,
Hauslinger & Young, Ltd.
33 North LaSalle Street
Chicago, Illinois 60602

Ira B. Rose
Phillips, Nizer, Benjamin,
Krim & Ballon
40 West 57th Street
New York, NY 10019

Mitchell Kramer
Steven Kapustin
Kramer and Salus
1520 Locust Street
Philadelphia, PA 19102

Max Sherman
Dvorkin & Sherman
100 North LaSalle Street
Chicago, Illinois 60602

David Bershad
Milberg, Weiss, Bershad
& Specthrie
One Pennsylvania Plaza
New York, NY 10001

Alan L. Unikel
Rosenberg, Savner & Unikel
10 South LaSalle Street
Chicago, Illinois 60603

Lawrence H. Eiger
Much, Shelist, Freed,
Denenberg, Ament & Eiger
135 South LaSalle Street
Chicago, Illinois 60603

Ben Cohen
High J. Schwartzberg
Schwartzberg, Barnett
& Cohen
11 South LaSalle Street
Chicago, Illinois 60603

Edward Labaton
Stuart D. Wechsler
Kass, Goodkind, Wechsler
& Labaton
122 East 42nd Street
New York, NY 10017

Robert H. Snow
Robert H. Snow, Ltd.
77 West Washington Street
Chicago, Illinois 60602

Sherrie R. Savett
Berger & Montague, P. C.
1622 Locust Street
Philadelphia, PA 19103

ADDENDUM.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 80-1375, 80-1399

RUTH PANTER and RICHARD WEISS, *et al.*,
Plaintiffs-Appellants,

v.

MARSHALL FIELD & COMPANY, *et al.*,
Defendants-Appellees.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING *EN BANC*

Interest of the Securities and Exchange Commission

The Securities and Exchange Commission, the agency principally responsible for the administration and enforcement of the federal securities laws, submits this memorandum, *amicus curiae*, on plaintiffs' pending petitions for rehearing and suggestions for rehearing *en banc* of the panel's decision of April 2, 1981. The Commission is concerned because, in its view, the panel resolved significant questions relating to the interpretation of antifraud provisions of the federal securities laws in the context of takeover contests in a manner which could have serious adverse effects both on the enforcement of the federal securities laws by the Commission and on the maintenance of private rights of action which provide an essential means of redress for injured investors.

When a hostile takeover bid is made, incumbent management and an outside or minority interest engage in a struggle for corporate control. Tender offer legislation, including the antifraud provisions of Section 14(e) of the Securities Exchange Act, was enacted by Congress to resolve the problems attendant to such contests, without tipping the scales in favor of either side. In the Commission's view, the panel here unduly restricted the protections afforded by such legislation because it erroneously concluded that Congress sought only to protect the right of the shareholders of a company subject to a takeover bid to determine, free of fraud, whether or not to tender. This ultimate decision whether to tender is, without doubt, an important focus of the tender offer process. But, struggles for corporate control are also fought on other fronts. Management may, for example, make statements designed to convince the offeror to withdraw its proposal. Furthermore, statements which affect either the shareholders' ultimate decision whether to tender or the offeror's decision to pursue the tender offer can also have an immediate impact on investment decisions being made in the market. Tender offer legislation protects the subject company's shareholders from fraud in these contexts as well.

The panel's erroneous belief that Section 14(e) protects only the shareholders' decision whether to tender led it to several results. First, there is language in the opinion which suggests that the prohibitions of Section 14(e) are not applicable if an announced proposal to make a tender offer is withdrawn prior to the effective date of the offer, *i.e.*, prior to the time the shareholders are given the opportunity to actually tender their shares. Second, the panel concluded that the subject company's success in defeating a tender offer proposal prior to the effective date deprives the shareholders of standing under Section 14(e) to seek damages. Third, the panel concluded that, in a private damage action under Section 14(e), plaintiffs must prove their reliance on the defendants' deception in order to recover. The Commission submits that the panel erred in these conclusions, as discussed in Points I, II, and III of this memorandum.

The panel further confined the scope of Section 14(e) by virtue of its belief that that provision is identical to Rule 10b-5 (except, of course, that the latter antifraud provision applies in connection with a securities purchase or sale rather than in connection with a tender offer). This interpretation of the language of Section 14(e), however, is squarely in conflict with the Supreme Court's recent interpretation of nearly identical language in Section 17(a)(2) of the Securities Act of 1933 in *Aaron v. Securities and Exchange Commission*, 446 U. S. 680 (1980). The panel's interpretation here led it to assure that scienter, and either deception or manipulation, are essential elements of a Section 14(e) violation. We deal with these matters in Point IV, *infra*.

Finally, the panel went beyond its conclusions relating to Section 14(e) and also unduly restricted the roles of Rule 10b-5's antifraud protections, which are applicable in other contexts besides tender offers. As we discuss in Point V, *infra*, the panel's expansive reading of the Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462 (1977), concerning the scope of Section 10(b) of the Securities Exchange Act and Rule 10b-5, conflicts with a decision of this Court, *Wright v. Heizer Corp.*, 560 F. 2d 236 (1977), *cert. denied*, 434 U. S. 1066 (1979), and with an unbroken line of decisions in other circuits.

The Commission urges the Court, at a minimum, to delete from its opinion a number of broadly-worded conclusions of law concerning Sections 10(b) and 14(e)—conclusions which are unnecessary to the panel's decision but which have far-reaching implications for future cases, to the detriment of the public investors whose interests the Commission has a duty to protect.

I. Section 14(e) of the Securities Exchange Act Prohibits Deception During the Entire Tender Offer Process.

In affirming the district court's grant of a directed verdict in favor of defendants with respect to plaintiffs' Section 14(e) claims, the panel majority held that plaintiffs in this private action were not entitled to the recovery of damages under the circumstances of this case because the tender offer never became effective. *See* slip op. 14-21. As discussed in Point II, *infra*, the Commission is concerned that the panel unduly restricted the scope of the Section 14(e) private right of action. But the Commission is also concerned because the panel majority's opinion contains language which goes beyond private rights and appears to confine the scope of the statutory provision itself, thus significantly eroding the protections provided by the Commission's own enforcement efforts.[1] We urge the Court to delete this language from the opinion because attempts will undoubtedly be made to use it in future litigation to the detriment of investor protection.

As the Commission urged in its earlier briefs (*see* C. Br. 16-22 & C. Supp. Br. 7-8),[2] the broad antifraud prohibitions of Section 14(e) are applicable during the entire tender offer process, beginning at least as early as the time of the first public announcement of a tender offer proposal. The withdrawal of a tender offer proposal prior to the time the shareholders are given the opportunity to tender their shares should not retroactively license deception, either by the offeror or by management. To the contrary, the coverage of the statute after the announcement of a tender offer proposal simply cannot depend on whether, at a later time, shareholders are actually given the opportunity to tender their shares.

---

[1] *See, e.g.*, slip op. 18 ("The language [of Section 14(e)] * * * does seem to contemplate the existence of an effective offer capable of acceptance by the shareholders. The legislative history of the Act is replete with indications that * * * the sole purpose of § 14(e) is protection of the investor faced with the decision to tender or retain his shares * * *."); *id.* at 20 ("§ 14(e) was not intended to remedy the conduct complained of here * * *.").

[2] "C. Supp. Br." refers to the Supplemental Brief, *Amicus Curiae*, filed by the Commission prior to the panel decision; "C. Br." refers to the Commission's opening brief; and "Def. Br." refers to the brief filed by defendants-appellees in this Court prior to the panel decision.

The panel majority, emphasizing the terms "tender offer" and "offer" in the statute, concluded that the language of Section 14(e), "while not unambiguous, * * * seem[s] to contemplate the existence of an effective offer capable of acceptance by the shareholders" (slip op. 18). But, the statutory language extends not only to fraud "in connection with any tender offer," but also to fraud "in connection with any * * * request or invitation for tenders *or* any *solicitation* of security holders in opposition to or in favor of any such offer, request or invitation." Section 14(e), 15 U.S.C. 78n(e) (emphasis supplied). A communication which does not formally request the present tendering of shares may nevertheless be a Section 14(e) "solicitation" if it is made as part of a process which may result in the tendering of shares.[3] And, deception occurring "in connection with" such a communication is proscribed by Section 14(e). Moreover, even apart from the statute's application to solicitations, the panel's construction of the phrase "in connection with any tender offer" is unduly narrow.[4]

---

[3] *Cf. Smallwood v. Pearl Brewing Co.*, 489 F. 2d 579, 600 (5th Cir.), *cert. denied*, 419 U. S. 873 (1974); *Studebaker Corp. v. Gittlin*, 360 F. 2d 692, 696 (2d Cir. 1966); *Securities and Exchange Commission v. Okin*, 132 F. 2d 784, 786 (2d Cir. 1943) (these cases involved proxy solicitation under Section 14(a) of the Securities Exchange Act, 15 U. S. C. 78n(a)).

The majority, while recognizing that, following the announcement of a tender offer proposal, shareholders of a subject company are faced with an immediate investment decision even if they are not ultimately given an opportunity to tender their shares (*see* slip op. 14), nonetheless relied on legislative history which, in its view, demonstrates that "the sole purpose" of Section 14(e) is protection of an investor faced with the actual "decision to tender or retain his shares" (slip op. 18). The legislative history cited in the opinion, however, merely indicates that one purpose of the statute was to ensure that shareholders of a subject company are supplied with information necessary for a informed decision whether or not to tender their shares to the bidder; it does not support the proposition that the shareholders' decision whether or not to tender is the only decision which Congress meant to protect. That Congress' concern also encompassed market investment decisions concerning a security for which there has been a public announcement of a proposed tender offer is evidenced by the broad language of the statute itself and by even more expansive legislative history which discloses a legislative intent to regulate the activities of anyone "engaged in making or opposing tenders or otherwise *seeking to influence * * * the outcome of a tender offer.*"[5]

---

[4] The phrase "in connection with any tender offer" does not require an actual request for the present tendering of shares. As this Court has noted in a case arising under Section 10(b),

> "[t]he Supreme Court has interpreted the 'in connection with' requirement broadly: To be actionable, the deception need only 'touch' the transaction complained of. *Superintendent of Insurance v. Bankers Life & Casualty Co., supra*, 404 U. S. at 12-13, quoted with approval in *Santa Fe Industries v. Green, supra*, 430 U. S. at 476."

Goodman v. Epstein, 582 F. 2d 388, 410 (7th Cir. 1978), *cert. denied*, 440 U. S. 939 (1979). *See United States v. Naftalin*, 441 U. S. 768, 773 n. 4 (1979).

In addition, Congress left the term "tender offer" undefined, and thus far it has been developed on a case-by-case basis. *See Smallwood v. Pearl Brewing Company, supra*, 489 F. 2d at 598; *Wellman v. Dickinson*, 475 F. Supp. 783, 823 (S. D. N. Y. 1979), *appeal pending on other grounds* (2d Cir.). Moreover, the term "offer" is broadly defined under the securities laws to include a "solicitation of an offer." *See* Section 2(3) of the Securities Act, 15 U. S. C. 77b(3). The prohibition in Section 5(c) of the Securities Act, 15 U. S. C. 77e(c), against *offering* to sell securities prior to the filing of a registration statement has long been interpreted to extend to publicity prior to an actual formal offer if it "contribute[s] to conditioning the public mind or arousing public interest in the issuer or in the securities of an issuer in a manner which raises a serious question whether the publicity is not in fact part of the selling effort." Securities Act Rel. No. 3844, 22 Fed. Reg. 8359 (Oct. 4, 1957); *see* Securities Act Rel. No. 4697, 29 Fed. Reg. 7317 (May 28, 1964).

In short, the Commission believes, as Judge Cudahy stated in his dissent (slip op. 68), that limiting the scope of Section 14(e) to exclude situations where the tender offer is withdrawn prior to its effective date

---

[5] S. Rep. No. 550, 90th Cong., 1st Sess. 10-11 (1967) (emphasis supplied); H. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968) (emphasis supplied). *See also* Securities Exchange Act Rel. No. 17120, (Sept. 4, 1980) 20 *SEC Docket* 1241, 1246-1247 & nn. 26-27 (Sept. 16, 1980). The panel majority cited cases under Section 14(d) of the Securities Exchange Act, 15 U. S. C. 78n(d), involving "unconventional tender offers" for the proposition that "the distinguishing characteristic" of tender offers generally is "the exertion of pressure on the shareholders to make a hasty, ill-considered decision to sell their shares" (slip op. 19). The exertion of such pressure on shareholders, however, although relevant, is not the exclusive determinant of a tender offer. *See Wellman v. Dickinson, supra,* 475 F. Supp. at 823-825.

"is simply an invitation to incumbent management to * * * speak without restraint knowing that once withdrawal is forced there is no Securities [Exchange] Act liability for deception practiced before withdrawal took place."

II. A Subject Company's Success in Defeating a Tender Offer Proposal Prior to the Effective Date of the Offer Does Not Deprive the Shareholders of Standing to Seek Damages Under Section 14(e).

Defendants' challenge to the private right of action for damages under Section 14(e) in this case is a limited one, since they conceded before the panel that "*where a tender offer is actually made*, it may be appropriate to award damages under Section 14(e) based upon misstatements made prior to the commencement of the offer" (Def. Br. 59, emphasis supplied).[6] The question presented here, however, is whether shareholders allegedly deceived by material misstatements or omissions should be denied standing to bring an action for damages simply because the proposed tender offer to which the deception related never became effective.[7]

---

[6] There is ample support for concluding that there is a private action under Section 14(e), at least where shareholders are actually given the opportunity to tender. *See* C. Supp. Br. 5-6 n. 4. As this Court noted in *Indiana National Bank v. Mobil Oil Corp.*, 578 F. 2d 180, 183 n. 5 (1978): "Although the Williams Act [of which Section 14(e) is a part] contains no explicit provision for a private cause of action, it is generally recognized that there is an implied right of action under § 14(e)."

[7] The panel majority failed to consider certain loopholes which its interpretation would create. For example, abuses would occur where incumbent management deceives shareholders and traders in the market with false representations that the company's shares are worth far more than the price offered in the tender

The panel majority's rationale for denying an implied right of action in favor of plaintiffs was based in part upon its belief that the Supreme Court in recent years "has continually limited the federal remedy in private securities actions" (slip op. 19-20). But, notwithstanding any general trend in the Supreme Court, individual analysis of each case is required. As previously noted, the language and legislative history of Section 14(e) support the Commission's view that that provision was intended to protect shareholders of a subject company from deception even where the persons responsible for the material misstatements or omissions accomplish their objective of defeating the proposed tender offer prior to its effective date.[8]

---

7. (Cont'd.)

offer proposal (by, *e.g.*, grossly overstating the value of assets or profitability of operations), there is a resulting rise in the price of the stock, the price rise makes the hostile tender offer either too unlikely to succeed or too expensive, and the bidder withdraws the proposal prior to the time when tenders would be accepted. In that situation, the shareholders who relied on management's misrepresentations and held their shares are deprived of both the tender offer opportunity (which would have given them at least a pro rata sale at the highest price paid by the tender offeror) and the rise in market price attendant to a premium price tender offer (which would have given them a sale of all their shares at the higher market price). Since there would be no purchases or sales by the defrauded shareholders, they could not recover damages under Rule 10b-5. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723 (1975). Thus, if the panel's restriction of the scope of the private right of action under Section 14(e) is upheld, incumbent management can blatantly misstate material facts to preserve their positions without fear of damage liability to such shareholders so long as they force the withdrawal prior to the effective date of the offer.

8. The panel majority stated its belief (slip op. 20-21) that preliminary injunctive relief would be the "appropriate remedy" for the situation where persons falsely announce an intention to

III. Proof of Reliance by the Plaintiff Shareholder Is Not the Sole Means by Which a Plaintiff Can Demonstrate Causation-in-Fact Under Section 14(e).

With respect to plaintiffs' Section 14(e) claim that defendants' deception deprived them of their opportunity to tender their shares at a substantial premium, the panel majority concluded (slip op. 14-17) that plaintiffs could not recover because they had failed to demonstrate that they acted in reliance on defendants' deception in determining whether or not to tender their shares. While the Commission does not disagree with the panel's conclusion that there must be a causal link between defendants' deception and the harm suffered by plaintiffs if plaintiffs are to recover, reliance is not the only means of establishing such a link, nor is it a prerequisite to recovery

---

8. (Cont'd.)

make a tender offer when their actual purpose is merely to put pressure on management to consider merger proposals. The panel did not consider, however, the situation where the deception, whether perpetrated by a bogus tender offeror or by incumbent management of a subject company, is not discovered until after the proposed transaction has been defeated or forced upon the company. In this regard, the panel's reliance on the Supreme Court's quotation of Judge Friendly's stated predilection for preliminary injunctive relief (in *Electronic Specialty Co. v. International Controls Corp.*, 409 F. 2d 937, 947 (2d Cir. 1969)) is misplaced. The Supreme Court cited Judge Friendly's preference with approval in the context of a damage action brought by a defeated tender offeror. The Court held that the competing tender offeror was not an intended beneficiary of the statute and denied it standing to sue. *Piper v. Chris-Craft Industries*, 430 U. S. 1, 26-37, 42 (1977). Here, by contrast, standing has been denied to shareholders of the subject company, who are indisputably among the intended beneficiaries of the statute so long as the defendants' alleged deception does not too promptly achieve its purpose of defeating the tender offer. *See* slip op. 18.

in all private damage actions under Section 14(e). Proof of plaintiffs' reliance on the deception, while the most common method of establishing the requisite causation-in-fact, is not the sole method.[9] To the extent that *Lewis v. McGraw*, 619 F. 2d 192 (2d Cir.), *cert. denied*, 101 S. Ct. 354 (1980), may suggest that proof of reliance is the only way to establish the necessary causal link under Section 14(e) between defendants' misconduct and the harm suffered by plaintiffs, the Commission submits that that decision is erroneous.

Under Section 10(b), it is well-recognized that a private plaintiff need not always prove his reliance to establish a claim for relief. Thus, for example, as the panel recognized (slip op. 15-16), there is a presumption of reliance in cases involving primarily a failure to disclose. *See Affiliated Ute Citizens v. United States*, 406 U. S. 128, 153-154 (1972). And, in cases involving a fraud on the market, proof of the plaintiff's reliance is "irrelevant." *Blackie v. Barrack*, 524 F. 2d 891, 907 (9th Cir. 1975), *cert. denied*, 429 U. S. 816 (1976). In these cases, which arise under Section 10(b) and Rule 10b-5, where the defendant's deception or manipulation alters the market price of a security and the plaintiff purchases in the market, the defendant's conduct is in fact the cause of the plaintiff's injury. This is true regardless of whether the plaintiff relies on the defendant's deceptive statements, because enough other people in the market have so relied, thereby causing a change in the price of the security.[10]

---

[9] Historically, the plaintiff's proof of reliance (a form of causation-in-fact) was required in a common-law action for misrepresentation because it established a causal connection between the defendant's misconduct and the course of conduct chosen by plaintiff, which choice resulted in plaintiff's injury and loss. *See* W. Prosser, *Handbook of the Law of Torts* § 108 (4th ed. 1971); *List v. Fashion Park, Inc.*, 340 F. 2d 457, 462-464 (2d Cir.), *cert. denied*, 382 U. S. 811 (1965). Causation-in-fact must, of course, be carefully distinguished from proximate or legal causation, a foreseeability concept which is a separate element of the common law action. At common law, proximate cause limited recovery, as a policy matter, to situations where the plaintiff's injury was a reasonably foreseeable consequence of the defendant's misconduct. *See* W. Prosser, *supra*, § 110 at 782.

There is nothing in the language, legislative history, or purpose of Section 14(e) which would dictate a different result—requiring proof of the plaintiff's individual reliance in each case—under that section.[11] For example, causation-in-fact would be adequately established in a Section 14(e) case (without regard to shareholder reliance) in a situation where the management of a company subject to a tender offer proposal, by its deception, causes the tender offeror to reconsider its judgment that the subject company is an attractive takeover candidate and, thus, to withdraw its proposal. Under these circumstances, the shareholders are injured by management's deception regardless of the fact that, never having been given an opportunity to tender their shares, they could not have relied on the misleading information in making a decision whether to tender.[12]

---

[10] *See generally* Note, *The Reliance Requirement in Private Actions under SEC Rule 10b-5*, 88 Harv. L. Rev. 584, 593 (1975).

[11] *See Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F. 2d 341, 374-75 (2d Cir.), *cert. denied*, 414 U. S. 910 (1973); *cf. Schlick v. Penn-Dixie Cement Corp.*, 507 F. 2d 374, 380-81 (2d Cir. 1974), *cert. denied*, 421 U. S. 976 (1975) (Section 14(a) and Rule 14a-9 thereunder).

[12] A well-established line of cases, including a decision of this Court, provides another means of proving causation-in-fact. Those cases, which arise under Section 10(b) and Rule 10b-5, recognize that a plaintiff can establish a claim for relief in a situation where defendant's deception caused plaintiff to forego a state court remedy for breach of fiduciary duty. Application of that rule to Section 14(e) establishes another means of demon-

IV. The Antifraud Prohibitions of Section 14(e) Are Not Coextensive With Those of Rule 10b-5.

The panel majority stated (slip op. 12) that Section 14(e) and Rule 10b-5 "are coextensive in their antifraud prohibitions, and differ only in their 'in connection with' language." In light of this erroneous equation of the two provisions, the panel concluded (slip op. 17) that the principle of *Santa Fe Industries, Inc. v. Green*, 430 U. S. 462 (1977)—that Section 10(b) and Rule 10b-5 thereunder prohibit only conduct which is manipulative or deceptive—extends to Section 14(e) and, thus, barred any attempt by plaintiffs to seek redress under that provision for harm suffered as a result of the defendants' alleged breach of their fiduciary duties. The erroneous equation of the two likewise led the panel to conclude that the Rule 10b-5 requirement of scienter [13] also extends to Section 14(e).[14]

---

12. (Cont'd.)

strating the necessary link between the deception and plaintiff's course of conduct (and, thus, the harm plaintiff suffered). For example, in a situation, as here, where the withdrawal of the tender offer proposal was caused by defensive actions undertaken by management, plaintiff-shareholders could claim that, if the deception had not occurred, they could have enjoined management's actions. *See Wright v. Heizer Corp., supra*, 560 F. 2d at 250; *Goldberg v. Meridor*, 567 F. 2d 209, 221 (2d Cir. 1977), *cert. denied*, 434 U. S. 1069 (1978); *Healey v. Catalyst Recovery of Pa., Inc.*, 616 F. 2d 641, 645-649 (3d Cir. 1980); *Alabama Farm Bureau Mutual Cas. Co. v. American Fidelity Life Ins. Co.*, 606 F. 2d 602, 614 (5th Cir. 1979), *cert. denied*, 101 S. Ct. 77 (1980); *Kidwell ex rel. Penfold v. Meikle*, 597 F. 2d 1273, 1290-1292 (9th Cir. 1979).

[13] *See Aaron v. Securities and Exchange Commission, supra*, 446 U. S. 680; *Ernst & Ernst v. Hochfelder*, 425 U. S. 185 (1976).

[14] The panel majority stated (slip op. 12) that "[t]he requisite mental state for [the antifraud violations alleged here] is at least recklessness." This statement implies that proof of scienter—

There are, however, a number of important differences between Rule 10b-5 and Section 14(e)—differences which, in certain respects, extend the latter provision to a broader range of conduct. Had the panel focused on these distinctions, it may well have reached contrary conclusions concerning the application of these Rule 10b-5 principles to Section 14(e).

Unlike Rule 10b-5, the meaning of Section 14(e) is not confined by the language of a separate governing statute, *i.e.*, Section 10(b).[15] Thus, it is significant that, unlike Section 10(b), Section 14(e) expressly prohibits the making of false statements and half-truths. And, Section 14(e), unlike Section 10(b), applies to "acts" and "practices" rather than just "device[s]" and "contrivance[s]." Also, unlike Section 10(b), Section 14(e)'s antifraud prohibitions extend to conduct which is "fraudulent," not only "manipulative" or "deceptive." Moreover, the rulemaking power granted to the Commission under Section 14(e) is significantly broader than that granted under Section 10(b), because it extends beyond the Section 10(b) power to prohibit manipulative or deceptive devices or contrivances and permits the Commission to "define, and prescribe means reasonably designed to prevent," fraudulent, deceptive or manipulative acts or practices.[16]

---

14. (Cont'd.)

i.e., reckless, knowing or intentional conduct—is an essential element of a violation of Section 14(e).

[15] The reasoning of the Supreme Court in *Ernst & Ernst v. Hochelder, supra,* 425 U. S. 185, and *Santa Fe Industries, Inc. v. Green, supra,* 430 U. S. 462, turned, in large part, upon the limitations imposed on Rule 10b-5 by the statutory language of Section 10(b).

[16] The panel's equation of Rule 10b-5 and Section 14(e) seems to presume that the latter provision was modeled after the

Differences in language like certain of those noted above were the basis for the Supreme Court's rulings on the scienter question under Rule 10b-5 and under Section 17(a) of the Securities Act, 15 U. S. C. 77q(a), in *Aaron v. Securities and Exchange Commission, supra*, 446 U. S. 680, and *Ernst & Ernst v. Hochfelder*, 425 U. S. 185 (1976). Significantly, in holding that scienter is required under Rule 10b-5, the Supreme Court relied heavily on the presence of the words "device" and "contrivance" in Section 10(b)—words not found in Section 14(e). 446 U. S. at 690; 425 U. S. at 197-201. Of even greater significance here is the Supreme Court's holding in *Aaron* that scienter is not required under Section 17(a)(2)—a holding based on that provision's language which is virtually identical to one of the alternative clauses of Section 14(e). 446 U. S. at 695-697.[17] Thus, the panel's interpretation of Section 14(e) is squarely in conflict with the Supreme Court's decision in *Aaron*. And, in light of the distinctions between Section 10(b) and Section 14(e), scienter is not an element of a violation of Section 14(e).[18]

---

16. (Cont'd.)

former. In fact, in various respects, tender offer legislation—including Section 14(e)—was patterned on the proxy regulation provisions of the federal securities laws, Section 14(a) of the Securities Exchange Act and rules thereunder. *See* C. Br. 17 n. 19.

[17] *Compare* Section 17(a)(2) ("any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading * * *") *with* Section 14(e) ("to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading * * *").

[18] With respect to the applicability to Section 14(e) of the *Santa Fe* requirement of deception or manipulation, the panel

For the foregoing reasons, the Commission urges the Court to delete those portions of the panel opinion which state that the antifraud prohibitions of Rule 10b-5 and Section 14(e) are coextensive, including any statements based on this analysis which presume that scienter or deception are necessary elements of a violation of Section 14(e).

V. *Santa Fe Industries, Inc. v. Green* Does Not Preclude a Rule 10b-5 Claim Where Deception Is Alleged.

The principal focus of the majority's discussion of Section 10(b) and Rule 10b-5 (slip op. 21-32) is *Santa Fe Industries, Inc. v. Green, supra,* 430 U. S. at 474, in which the Supreme Court held that "a claim of fraud and fiduciary breach * * * states a cause of action under any part of Rule 10b-5 only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute." The panel majority here concluded that plaintiffs' allegations concerning defendants' undisclosed "policy of independence" merely stated a claim for breach of fiduciary duty under state law (slip op. 23-24) and that those allegations, as well as most of the other misrepresentations and omissions allegedly made by defendants,

---

18. (Cont'd.)

failed to take into account various pertinent considerations. The Supreme Court's decision in *Santa Fe* turned, in large part, on Section 10(b)'s limitation to manipulative or deceptive conduct. 430 U. S. at 471-474. As noted above, Section 14(e) is not so limited; rather, without need for rulemaking, it extends to "*fraudulent,* deceptive or manipulative *acts or practices,*" and the Commission's rulemaking power is much broader. *See also, Hearings on S. 510 Before the Senate Subcommittee on Securities of the Committee on Banking & Currency,* 90th Cong., 1st Sess. 16, 17, 21, 33-35 (1967). Also pertinent is the fact that the Williams Act substantively regulates the terms and conditions which may be utilized in a tender offer. *See, e.g.,* Section 14(d)(5)-(7), 15 U. S. C. 78n(d)(5)-(7).

were barred from federal securities law scrutiny by *Santa Fe*. In so concluding, the panel quoted (slip op. 25) from *Hundahl v. United Benefit Life Insurance Co.*, 465 F. Supp. 1349, 1365-1366 (N. D. Tex. 1979), for "the post-*Santa Fe* rule" that if

> "the central thrust of a claim or series of claims arises from acts of corporate mismanagement, the claims are not cognizable under federal law."

Since this language from *Hundahl* does not also refer to a lack of deception or manipulation, the panel's approval of the language represents a substantial expansion of *Santa Fe* and unduly restricts the scope of Section 10(b) and Rule 10b-5. While *Santa Fe* does require that a Rule 10b-5 claim involve material deception or manipulation, the language utilized here indicates that, whenever conduct amounts to a breach of fiduciary duty, there cannot also be a Rule 10b-5 claim for *deception* concerning facts relating to that conduct. Such a conclusion is contrary to the weight of authority on the issue, including prior case law in this Court.[19] *Santa Fe* "does not control a case in which information that would prove useful to investors is withheld." *Securities and Exchange Commission v. Blatt*, 583 F. 2d 1325, 1331 (5th Cir. 1978).

---

[19] *Wright v. Heizer Corp., supra*, 560 F. 2d at 246-250; *Goldberg v. Meridor, supra*, 567 F. 2d at 221; *Healey v. Catalyst Recovery of Pennsylvania, Inc., supra*, 616 F. 2d at 645-647; *Alabama Farm Bureau Mutual Casualty Co., Inc. v. American Fidelity Life Ins. Co., supra*, 606 F. 2d at 614; *Kidwell ex rel. Penfold v. Meikle, supra*, 597 F. 2d at 1290-1292. *See also Bailey v. Meister Brau, Inc.*, 535 F. 2d 982, 993 (7th Cir. 1976); *Dasho v. Susquehanna Corp.*, 461 F. 2d 11, 25-26 (7th Cir.), *cert. denied*, 408 U. S. 925 (1972), and 380 F. 2d 262, 269-270 (7th Cir.), *cert. denied*, 389 U. S. 977 (1967); *Shell v. Hensley*, 430 F. 2d 819, 826-827 (5th Cir. 1970); *Schoenbaum v. Firstbrook*, 405 F. 2d 215, 219-220 (2d Cir. 1968) (en banc), *cert. denied*, 395 U. S. 906 (1969); *Pappas v. Moss*, 393 F. 2d 865, 869 (3d Cir. 1968). Several of these cases were cited by the Supreme Court in *Santa Fe* as examples of cases involving an element of deception. *See* 430 U. S. at 475 n. 15.

Shortly after the Supreme Court's decision in *Santa Fe*, this Court took a much broader view of the scope of Section 10(b) and Rule 10b-5 than the majority opinion in the present case. *Wright v. Heizer Corp., supra*, 560 F. 2d 236. The *Heizer* Court held that while, after *Santa Fe*, the self-dealing of corporate fiduciaries itself could no longer be considered fraud in connection with the sale of securities, where those fiduciaries control the board of directors they have a duty to disclose to the company's shareholders the material facts concerning their self-dealing transactions prior to their consummation. The failure to fulfill that duty of disclosure was, the Court reasoned, a violation of Rule 10b-5. 560 F. 2d at 246-249.

The *Heizer* Court's reasoning should apply with equal force here. Thus, the materially deceptive misrepresentations and omissions alleged by plaintiffs, if established by the evidence, would violate Section 10(b) and Rule 10b-5 even if the facts omitted or misstated were related to a claim against the directors under state law for breach of fiduciary duty. *See also* C. Supp. Br. 1-4.

The Commission urges the Court to recognize expressly the vitality of *Heizer*, delete that portion of the panel opinion which utilized the overly broad *Hundahl* language, and reaffirm its adherence to the well-established principle that, where deception is alleged, *Santa Fe* does not preclude a Rule 10b-5 claim simply because of its relation to a state law breach of fiduciary duty claim.

CONCLUSION

For the foregoing reasons, the Commission believes that rehearing or rehearing *en banc* is warranted.

Respectfully submitted,

RALPH C. FERRARA
General Counsel

JACOB H. STILLMAN
Associate General Counsel

ELISSE B. WALTER
Assistant General Counsel

S. LEE TERRY, JR.
Attorney

Securities and Exchange Commission
Washington, D. C. 20549

Of Counsel
PAUL GONSON
Solicitor

May 1981

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
NOV 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-666

In the
Supreme Court of the United States

October Term, 1981

RUTH PANTER, ALICE D. SINSHEIMER, SAM BROWN, HAROLD KAMERLING, JULIUS GREEN, GEORGE A. LEVITT, JACK STACEY, JR., ESTELLE A. STACEY, ANITA H. JOHNSON, DONALD E. TRACY, BARBARA J. TRACY, IRVING J. HILLMAN, and STANLEY BERNSTEIN, each individually, and on behalf of the other Shareholders of Marshall Field & Co.

Petitioners,

vs.

MARSHALL FIELD & CO., JEAN ALLARD, ANGELO R. ARENA, HARRY BERCHER, EDWARD McCORMICK BLAIR, JOHN M. BUDD, ALBERT B. DICK III, ARTHUR E. OSBORNE, HOWARD M. PACKARD, GEORGE G. RINDER, JOHN M. SIMPSON, and HAROLD BYRON SMITH, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF

Irwin Panter,
Thomas I. Matyas
Christine A. Foh
Panter, Nelson & Bernfield, Ltd.,
33 North Dearborn Street, Suite 1930,
Chicago, Illinois 60602,
312/332-5060,
Attorneys for Petitioners.

TABLE OF CONTENTS

Page

Table of Authorities.................. i

Introduction.......................... 1

Argument.............................. 3

I. THE ACTS OF THE DIRECTORS IN CONNECTION WITH THIS TENDER OFFER WERE IN VIOLATION OF §14(e)......................... 3

  A. It Is Beyond Challenge That The Directors Caused The Withdrawal Of The Tender Offer...................... 4

  B. Reliance Need Not Be Shown Where The Directors Block A Tender Offer Before It Can Mature................. 7

  C. Determination As To Whether Causation Existed Was A Jury Question.............. 11

  D. The Directors Engaged In Manipulative Practices In Violation of §14(e) And Thus Accomplished The Withdrawal Of The Tender Offer..................... 13

Page

II. THE ANTI-TRUST LAWS DID NOT BAR THE SHAREHOLDERS' SALE OF THEIR STOCK............ 15

III. PETITIONERS' CLAIMS UNDER §14(e) ARE NOT BARRED BY THIS COURT'S DECISION IN SANTA FE........................ 17

Conclusion............................ 20

TABLE OF AUTHORITIES

Page

Altman v. Knight, 431 F.Supp. 309 (S.D.N.Y. 1977)................ 11,12

City of Rock Falls v. Chicago Title & Trust Co., 13 Ill.App.3d 359, 300 N.E.2d 331 (1973)......... 12

E.H.I. Of Florida, Inc. v. Insurance Co., 449 F.Supp. 1053 (1980).. 15

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)...................... 14

Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349 (N.D. Tex. 1979)......................... 10

Lewis v. McGraw, 619 F.2d 192 (2d Cir.), *cert. denied*, 449 U.S. 951 (1980)......................... 8,9

Prosser, *Law of Torts*, Sec. 130 (4th ed. 1971)................ 12,13

Rediker v. Geon Indus. Inc., 464 F.Supp. 73 (S.D.N.Y. 1977).... 9

Restatement of Torts, Sec. 766, comment b...................... 13

Santa Fe Indus. Inc. v. Green, 430 U.S. 1 (1977)............ 14,17 18,19,20

Smallwood v. Pearl Brewing Co., 489 F.2d 579 (5th Cir.), *cert denied*, 419 U.S. 873 (1974).......... 8

INTRODUCTION

This case presents unanswered questions of law which vitally affect the merger and acquisition activities of the business community.

There are no issues of fact in this case. Almost all the evidence pertinent to establishing liability was produced by the Respondents. Many of the findings of fact made by the Trial Court support this Appeal. The conclusions of law of the Trial and Appellate Courts drawn from the facts are the subject of this Petition.

What we seek from this Court is the resolution of important legal issues that are at present undefined, but are of daily import, such as:

What is the meaning of "in connection with any tender offer" under

§14(e)? Does it require an unconditional binding offer, the acceptance of which results in a contract under common law? Or may it be the initiation of a process intended to result in such contract? If so, at which stage do the prohibitions of §14(e) become operative?

Do the directors of a corporation have the right to make acquisitions and expansions, commence anti-trust suits, issue publicity releases, and take other "defensive" actions to defeat budding tender offers before they can flower, and then claim there was no "tender offer"? And thereafter assert that there was no "reliance" or "causation" because there was no "tender offer"? What actions can directors take to head off the sale by the owners of their stock?

Were the actions taken by Respondents in this case "manipulative acts or practices" under §14(e)?

Does the scope of the business judgment rule permit directors to deliberately defeat a sale of the company's stock by its owners, or is the rule restricted to protecting the directors in their activities in the operation, but not the sale, of the shares by their owners?

At what point in the developing process of a tender offer will the courts refuse to reward those directors who, in the defense of their power and position, successfully defeat a sale of stock by its owners?

ARGUMENT

I. THE ACTS OF THE DIRECTORS IN CONNECTION WITH THIS TENDER OFFER WERE IN VIOLATION OF §14(e).

A. It Is Beyond Challenge That The Directors Caused The Withdrawal Of The Tender Offer.

There are now before this Court three statements of fact set forth in the Petition and the two Responding Briefs. Facts are also found in the Opinions of the Trial and Appellate Court. The references herein will be only to the most pertinent.

The majority opinion of the Appellate Court concluded that the tender offer was withdrawn because of the actions of the Respondents:

> Here there is uncontroverted evidence that it was Field's recent acquisitions and plans for expansion that caused the withdrawal of the CHH tender offer. 646 F.2d at 825. (A. 167).

Other actions of the Respondents include:

The Respondents blocked CHH's proposed tender offer by retaining leading take-over attorneys to give advice on fighting take-overs and then earnestly following such advice. PX. 9; RA. 13;[1] A. 25,[2] 486 F.Supp. at 1176-1177, TR. 1004-06, 1121, 1217-18, 1227, 2027-28, 2101-03. The advice so given and followed includes delaying negotiations, (PX. 95, 96; RA. 137; TR. 1343-44), expansion and acquisition in the offering company's areas, (PX. 109, 130, 137, 148, 151, 238, 337; RA. 131, 197, 200; TR. 553, 689-70, 2939-40, 3182, 3190-92) filing and prosecuting an anti-trust lawsuit, (PX. 112; TR. 468, 2928) soliciting pertinent governmental agencies to intervene, (RA. 194; PX. 196) waging a publicity war, and proclaiming continually Respondents' absolute intention to keep Fields independent. PX. 428; RA. 152, 153, 158, 162, 166, 170-71, 181-82. The evidence submitted during the Petitioners' prima facie case clearly indicated that the tender offer was withdrawn due to the Respondents' actions. PX. 345; TR. 1404, 1406-07.

---

[1] Appendix in the Record of the Court of Appeals for the Seventh Circuit, hereinafter referred to as "RA."

[2] Appendix to Petition For Writ of Certiorari hereinafter referred to as "A."

The Trial Court gave insight into the motivations and actions of the Respondents:

> In each instance when approaches were made to its directors by anyone interested in acquiring it, or by another corporation that desired a merger, the directors considered the matter but concluded in each case that they did not want the company's uniqueness among its customers diluted by affiliation or merger with another retailer. (A. 19).

The court, however, did not explain why a desire by the directors to protect the company's uniqueness entitled them to deprive the owners of their rights to sell their property in the best market.

B. Reliance Need Not Be Shown Where The Directors Block A Tender Offer Before It Can Mature.

Respondents argue that there can be no §14(e) action since "there never was a tender offer requiring a shareholder decision whether to tender shares." (Respondents' Brief p. 14.) In support, Respondents cite a number of cases that involve very different circumstances. In those cases, there was no interference with the tender offer process whereby the tender offer was defeated by the efforts of the directors, and the shareholders were prevented from accepting or rejecting such a tender offer. Such a cynical view is not in keeping with the spirit of the Securities

Exchange Act of 1934 and the amendments thereto which were added by the Williams Act. Cf. Smallwood v. Pearl Brewing Co., 489 F.2d 579, 599 (5th Cir.) cert. denied, 419 U.S. 873 (1974).

Respondents attempt to rely upon Lewis v. McGraw, 619 F.2d 192 (2d Cir.), cert. denied, 449 U.S. 951 (1980), although it is by no means "virtually identical" to this case. (Respondents' brief p. 18). In Lewis, the first proposal for a business combination was withdrawn and replaced by an offer "that would not become effective unless McGraw-Hill's incumbent management agreed not to oppose it. . ." Id. at 194. The McGraw-Hill Board rejected the offer. Therefore, one of the conditions of the offer itself was the non-opposition of the McGraw-Hill Board. It is in this sense that reliance could not be shown, since the offer could be legitimately rejected by the directors before the shareholders had an opportunity to tender their shares. The Lewis offer had an unusual condition that is not present in this case; the affirmative approval of the directors was a pre-requisite to be met before the shareholder's had an opportunity to act.

The CHH tender offer, however, did not contain any precondition that it be accepted by Fields' Board. Since the Board was not able to defeat the offer legitimately, it resorted to illegal means in violation of §14(e).

Rediker v. Geon Industries, Inc., 464 F.Supp. 73 (S.D.N.Y. 1978) did not involve a conventional tender offer but rather an "arrangement structured as an asset sale and an immediate liquidation by the selling corporation . . ." Id. at 82. The deal eventually aborted. The court did not rule out the possibility that shareholders could state a claim for securities violations even though the shareholders were never in a position to accept or reject the deal.

The court in Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349, 1369 (N.D. Tex. 1979) declined to decide "whether in the usual case a specific showing of reliance is a pre-requisite to recovery under §14(e)." Instead it merely decided that no action exists where the persons "did not rely upon and were not fooled by the alleged misrepresentation in the tender offer materials." At p. 1369.

Also, since Petitioners claim that

the Respondents are guilty of manipulation to defeat a pending tender offer, reliance in the classic sense regarding misrepresentations and omissions is not applicable.

C. Determination As To Whether Causation Existed Was A Jury Question.

Petitioners do not dispute that they must prove a causal relationship between Respondents' activities and the damages suffered by Petitioners. Respondents' contention, however, that no jury could find that Respondents' activities caused Petitioners' damages is incorrect. Causation is a question of fact for the jury. A jury could reasonably find from the evidence that "but for" the actions of the Respondents, Petitioners would have had the opportunity to tender their stock to CHH for $42.00 per share.

Respondents' reliance on Altman v. Knight, 431 F.Supp. 309 (S.D.N.Y. 1977) is misplaced. That case was a derivative action by shareholders of a target company alleging that a defensive acquisition for the purpose of preventing a tender offer constituted corporate waste and violated §10b-5 and §14(e). Since Altman was a derivative action, the issue was whether the misstatements of the defendants damaged the corporation rather than the shareholders. Petitioners herein are not claiming that Respondents' activities caused damages to Fields but, rather to the shareholders by depriving them of the opportunity to sell their stock to CHH at a significant premium.

The Trial Court was incorrect in concluding that Petitioners had to prove an enforceable offer. City of Rock Falls v. Chicago Title & Trust Co., 13 Ill.App. 3d 359, 300 N.E.2d 331 (1973); Prosser, Law of Torts, §130, at 949 (4th ed. 1971); Restatement of Torts, §766, comment b.

Therefore, a jury could reasonably find from the entire body of the evidence that the actions of the directors caused the failure of the offer. In fact, the Trial and Appellate Courts found that the actions and motivations of the directors are what caused the withdrawal of the offer. (See citations above pp. 4 and 6.)

D. The Directors Engaged In Manipulative Practices In Violation Of §14(e) And Thus Accomplished The Withdrawal Of The Tender Offer.

That the actions of the Respondents, as spelled out in the statements of facts and summarized in §I.A. above constituted manipulative conduct which defeated the tender offer is beyond challenge. And if the Respondents were still to deny that this was the fact, it would be most difficult for them to deny that it was at the very least a question for the jury.

Respondents, however, attempt to severely limit the definition of "manipulative conduct" by citing two §10(b) cases, Ernst & Ernst v. Hohfelder, 425 U.S. 185 (1976) and Santa Fe Industries, Inc., v. Green, 430 U.S. 1 (1977), which define manipulative conduct solely in relation to its effect on the price of securities.

Such a narrow interpretation of "manipulative acts or practices" is not warranted. Both Ernst, supra, and Santa Fe, supra, held that manipulative acts and practices connote intentional or willful conduct as compared to negligence (Ernst) or unfair treatment by a fiduciary (Santa Fe).

There is nothing in the cases Respondents have cited, in the history of the Act, or in the English language that justifies such a narrow interpretation of "manipulative acts or practices". The Act was framed as remedial legislation to protect the investing public from all manipulative activities. E.H.I. of Florida, Inc. v. Insurance Co., 449 F.Supp. 1053 (1980).

There is no authoritative statement by this Court as to the propriety of the actions taken by the Respondents. Certainly they should not escape scrutiny by defining "manipulative" as applying only to actions regarding prices of securities.

II. THE ANTI-TRUST LAWS DID NOT BAR THE SHAREHOLDERS' SALE OF THEIR STOCK

The lower courts and the Respondents have attempted to justify interference with the tender offer by asserting that a combination of the two companies would have violated the anti-trust laws of the United States. There are several glaring errors in this stand.

The Respondents by their own admission took great pains to repeatedly communicate their fears to every pertinent governmental body without any legal requirement to do so. They even went to the extent of preparing a complaint for the Attorney General of Illinois without being requested to do so. They filed their own suit within hours of being notified of the offer. No governmental agency took any action.

The purchaser would have been the one to suffer if divestiture were ordered after a sale; yet purchaser's equally competent attorneys advised that any possible anti-trust problem could be solved. PX. 111, TR. 1329-30, 1338. CHH was willing to assume the risk. So why was the Board of Marshall Field so concerned? And why did they make these desperate attempts to secure governmental intervention? The shareholders would have suffered no penalty from the divestiture.

This frantic behavior was not motivated by a desire to protect the shareholders who suffered a loss of $22.00 per share without economic or legal justification, from the anti-trust laws; nor by a desire to be good citizens. Any fair evaluation of all of their actions must lead to the conclusion that the directors were manipulating every resource to evade an acquisition that would deprive them of their power.

III. PETITIONERS' CLAIMS UNDER §14(e) ARE NOT BARRED BY THIS COURT'S DECISION IN SANTA FE.

The Petition for Writ of Certiorari properly excluded Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). Santa Fe is not germane to Petitioners' action. The Respondents lengthy examination of Santa Fe, and its progeny clouds the true issues presented by the Petitioners.

In Santa Fe the Court granted certiorari and concluded that §10(b) does not authorize a cause of action for mere breach of fiduciary duty where the conduct does not involve manipulation or deception but does involve issues of fairness to the shareholders. This Court stated the following at page 474:

> As we have indicated, the case comes to us on the premise that the complaint failed to allege a material misrepresentation or material failure to disclose. The finding of the District Court, undisturbed by the Court of Appeals, was that there

> was no 'omission' or 'misstatement' in the information statement accompanying the notice of merger. On the basis of the information provided, minority shareholders could either accept the price offered or reject it and seek an appraisal in the Delaware Court of Chancery. Their choice was fairly presented and they were furnished with all relevant information on which to base their decision. (Emphasis Added).

Incredibly, the Respondents' brief grossly mischaracterizes the Petitioners' pleadings and proof. The Respondents would have the Court believe that the Petitioners did not claim manipulation or deception. The complaint and the evidence shows that the Respondents are guilty of disseminating untrue, misleading or incomplete press releases, letters, and other communications, and that the Respondents' engaged in deceptive, fraudulent, or manipulative acts and practices in violation of §14(e).

In the pending case, manipulations, misstatements, and nondisclosures were proved. If the Fields' shareholders had

had the same opportunity as the *Santa Fe* shareholders, to-wit: the opportunity to accept or reject the offer with all relevant information honestly presented, this case would not now be pending.

CONCLUSION

This case of first impression presents the Court with an opportunity to fill a void in the existing law applicable to the field of acquisitions that is so much a part of our business community's daily activities.

Definition of the rights of shareholders in such situations would give certainty to the law and encourage investment in our corporate structure.

Respectfully submitted,
Irwin Panter
Irwin Panter
Attorney for Petitioners

Irwin Panter
Thomas I. Matyas
Christine A. Foh
PANTER, NELSON & BERNFIELD, LTD.
33 North Dearborn Street
Chicago, Illinois 60602
(312) 332-5060